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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

TYLER MURRAY, by and through
his parents and next friends,
John and Myrna Murray,

Plaintiff-Appellant,
Cross-Appellee,

v.

Nos. 93-1466
93-1474

MONTROSE COUNTY SCHOOL
DISTRICT RE-1J, a School
District of the State of Colorado,

Defendant-Appellee,
Cross-Appellant.

CENTER FOR LAW AND EDUCATION, INC.; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS; COLORADO DEVELOPMENTAL DISABILITIES PLANNING COUNCIL,

Amici Curiae.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLORADO
(D.C. NO. 91-C-1608)

Michael W. Breeskin (Chester R. Chapman and Kristin A. Kutz with him on the briefs), The Legal Center Serving Persons with Disabilities, Denver, Colorado, for Appellant/Cross-Appellee.

Susan S. Schermerhorn (Gerald A. Caplan and Alexander Halpern with her on the briefs), Caplan and Earnest, Boulder, Colorado, for Appellee/Cross-Appellant.

Maura J. Kelly, Kathleen B. Boundy, and Kathleen Noonan, Center for Law and Education, Cambridge, Massachusetts, on the brief for The Center for Law and Education and the Disability Rights Education and Defense Fund, Amici Curiae.

William P. Bethke, Denver, Colorado, on the brief for the Colorado Developmental Disabilities Planning Council, Amicus Curiae.

Stewart R. Hakola, Michigan Protection & Advocacy Service, Marquette, Michigan, on the brief for the National Association of Protection and Advocacy Systems, Amicus Curiae.

Before ANDERSON and McWILLIAMS, Circuit Judges, and BROWN,* District Judge.

ANDERSON, Circuit Judge.

Plaintiff and appellant Tyler Murray, by and through his parents and next friends John and Myrna Murray, appeals from the dismissal of his action under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485, against the Murray [sic] County School District, in which he challenged the District's decision to move him from his neighborhood school in Olathe, Colorado, to a school with a program for children with severe disabilities. The District cross-appeals the district court's earlier denial of a previously filed motion for summary judgment. For the following reasons, we affirm.

BACKGROUND

Tyler Murray ("Tyler") is a twelve-year-old boy with multiple disabilities due to cerebral palsy. His disabilities include significant mental and physical impairments, as well

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* The Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas,

sitting by designation.

as speech difficulties.[1] Tyler lives in Olathe, Colorado, approximately five blocks from Olathe Elementary School.

In late 1987 and in early 1988, Tyler was tested in anticipation of his commencing kindergarten in the fall of 1988. Olathe Elementary offers basic services to disabled children with "mild to moderate" ("M/M") needs. It offers these services through its two resource teachers, as well as through paraprofessionals and itinerant specialists.[2] When Tyler began kindergarten at Olathe, and until early 1991, the

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[1] The Administrative Law Judge made the following findings concerning Tyler's condition:

> His condition causes spastic quadriplegia and severe mobility and coordination deficits, particularly on the left side. His vision is impaired by inability to focus his eyes together. He has generally been able to move only with the aid of assistive devices, human assistance or both. Through much of his school time he has used a three-wheeled device designed so he can work while sitting in it. During the 1990-91 school year, he also learned to use a walker, at least on a limited basis. . . . He can climb stairs with difficulty and assistance, but cannot descend. He has also had difficulty writing, but has now learned to use his right hand while holding the paper with his left. His speech is frequently difficult to understand and he has been working with S/L therapists for several years.

Montrose County Sch. Dist. RE-1J v. Murray, No. Ed. 91-06, slip op. at 7; Appellant's App. Vol. IV at A- 0949.

[2] Itinerant specialists travel to different schools, offering specialized services to students at those schools for a part of each day.

school was not fully accessible to children with disabilities like Tyler's. It is now fully accessible. Another school, Northside Elementary School, located in Montrose, some ten miles from Olathe, has a specific program, implementing the Colorado Effective Education Model ("CEEM"), for children with "severe/profound" needs ("S/P"). It is fully accessible to disabled children. It is one of six elementary schools in Colorado implementing CEEM. Northside also contains regular education classrooms which serve nondisabled children.

In April and October of 1988, a multi-disciplinary staffing team at Olathe met to develop an individualized education program ("IEP") for Tyler, as the IDEA requires for each child with disabilities. *See* 20 U.S.C. §§ 1401(a)(18), 1414(a)(5).[3] The staffing team determined that Tyler's IEP could be implemented at Olathe. Tyler was in the regular kindergarten class at Olathe for the full two and one-half hour school day, with two to four hours per week of speech and occupational/physical therapy. As of February 1989 he began spending one and one-quarter to three and three-quarters hours per week in the resource room instead of the regular classroom.

The required annual review of Tyler's IEP occurred in May 1989, at which needs and goals were established for

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[3] The IEP, the cornerstone of the IDEA's goal of providing an appropriate education for each disabled student, is "a written statement that sets forth the child's present performance level, goals and objectives, specific services that will enable the child to meet those goals, and evaluation criteria and procedures to determine whether the child has met the goals." *Association for Community Living v. Romer*, 992 F.2d 1040, 1043 (10th Cir. 1993); *see* 20 U.S.C. § 1401(a)(20).

first grade.[4] Tyler remained at Olathe in the regular first grade classroom with five hours served in the resource room, one to two hours of speech and language therapy, and one and one-half hours of occupational therapy per week.

In January 1990 Tyler's IEP was reviewed because the staff at Olathe were concerned that he was not progressing as well as expected, and that his current educational placement might be inappropriate. His time in special education services was increased, and his curriculum was modified.

Tyler had surgery in July 1990, and spent six weeks in a cast, which caused him to regress in certain areas and made it difficult for him to meet his IEP goals during that time period.

At a meeting in August 1990, between the Murrays, Donald Binder, the Director of Student Services for the District, and others, District personnel suggested that the CEEM program at Northside might be a more appropriate placement for Tyler. The Murrays expressed their strong preference that Tyler remain at Olathe, where his sibling and neighborhood friends attended school.

At a triennial review held on November 27, 1990, Tyler's IEP was carefully reviewed and modified, and the staffing team discussed alternative placements, comparing the benefits of Olathe and Northside.[5] At that time, Tyler was

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[4] The IDEA requires each child's IEP to be reviewed at least annually. 20 U.S.C. §§ 1401(a)(20)(B), 1414(a)(5).

[5] Mr. Binder described a triennial review as a "reevaluation" of the student, designed to determine whether the child continues to need special education services, and, if so, the dimension of those services.

in second grade, but his academic level was determined to be kindergarten in some areas, and beginning first grade in others. Appellant's App. Vol. I at A-0044; Vol. IV at A-0730. His greatest area of strength was in social skills and interaction.

The staffing team was polled, and the Olathe psychologist, one of the resource teachers, the Olathe school principal, Tyler's regular classroom teacher at Olathe, and Mr. Binder all voted to place Tyler at Northside. Mr. Binder testified that the reasons for recommending placement at Northside were that the severe needs program was more appropriate for Tyler and that Olathe was not physically as accessible as Northside. Tyler's parents, his occupational therapist, his physical therapist, and his speech therapist all voted to have Tyler remain at Olathe. It is apparently undisputed that all members of the staffing team, and Tyler's parents, agreed on the needs, goals, and objectives contained in the IEP and that Tyler should spend most of his time outside the regular classroom setting.

On December 13, 1990, Mr. Binder sent the Murrays a letter indicating the District's intent to move Tyler to Northside, effective January 7, 1991, and informing the Murrays of their right to challenge that decision in a due process hearing.[6] The Murrays requested such a due process

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Appellant's App. Vol. I at A-0037-38. Tyler's triennial review was preceded by assessments of him, conducted by all district personnel who worked with him.

[6] Because the staffing team could not reach consensus on the appropriate placement for Tyler, the ultimate decision fell to Mr. Binder as the director of special education.

hearing before an independent hearing officer ("IHO"), as permitted by the IDEA, 20 U.S.C. § 1415(b)(2), as well as an independent educational and psychological evaluation of Tyler.

Following Tyler's evaluation by Dr. Sally Rogers, the staffing team reconvened in March 1991, along with Dr. Rogers, and prepared an addendum to Tyler's IEP, which made some clarifications and added some goals and objectives, primarily academic.[7] Nonetheless, the same majority of the team voted for placement at Northside, with the addition that the Olathe social worker also recommended placement at Northside. The Murrays continued to express their strong preference that Tyler remain at Olathe.

Because the matter remained unresolved, the due process hearing took place on March 25-27, 1991. The IHO determined that Olathe was providing an appropriate education for Tyler. The District appealed that decision to an administrative law judge ("ALJ"), who reversed the IHO's decision, holding that Tyler had not achieved any meaningful educational progress at Olathe and that Northside was the appropriate placement for him.

The Murrays thereafter filed a complaint in district court challenging the ALJ's decision. *See* 20 U.S.C. § 1415(e)(2). The District moved for summary judgment on November 22, 1991, which the district court denied on April 14, 1992. On

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[7] Dr. Rogers' assessments of Tyler's cognitive and educational abilities were consistent with the District's assessments. Appellant's App. Vol. I at A-0083.

August 11, 1992, the District moved to dismiss the complaint in part or for partial summary judgment, and the Murrays moved for partial summary judgment. On October 21, 1993, the district court granted the District's motion, affirmed the ALJ's decision, and dismissed the Murrays' claim.

The Murrays filed a notice of appeal from the dismissal of their claims, and the District filed a cross-appeal from the district court's denial of its November 22, 1991, motion for summary judgment. The Murrays have filed a motion to dismiss the cross-appeal, on the ground that the District, as the ultimately prevailing party, lacks standing to appeal an interlocutory order against it. Tyler has remained at Olathe throughout this entire period. He was evaluated in November of 1993, and the staffing team determined at that time that his IEP could be implemented at Olathe.[8]

DISCUSSION

I. IDEA

"The IDEA is a comprehensive statute enacted to ensure that all children with disabilities have access to 'a free appropriate public education . . . designed to meet their unique needs.'" *Association for Community Living*, 992 F.2d at 1042-43 (quoting 20 U.S.C. § 1400(c)); *see also*

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[8] Thus, Tyler is currently at Olathe pursuant to his IEP. We asked the parties to brief the question of whether Tyler's placement, pursuant to the November 1993 evaluation, rendered moot any issues in this case. As we discuss, *infra*, his placement renders moot certain issues before us, but does not render the entire case moot. Nothing in the supplemental briefs convinces us otherwise.

Board of Educ. v. Rowley, 458 U.S. 176, 181 (1982); *Beard v. Teska*, 31 F.3d 942, 950 (10th Cir. 1994). The IEP is the basic mechanism through which that goal is achieved for each disabled child. *See* 20 U.S.C. § 1401(a)(20); *see also Honig v. Doe*, 484 U.S. 305, 311 (1988). The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the "free appropriate public education" mandated by the Act.

Thus, a school district must give prior written notice whenever it proposes to change, or it refuses to change, any aspect of a child's education. 20 U.S.C. § 1415(b)(1)(C). A parent wishing to challenge a school district decision is entitled to an impartial due process hearing conducted by a state, local or intermediate educational agency. 20 U.S.C. § 1415(b)(2). *See Association for Community Living*, 992 F.2d at 1043. Appeal from the local or intermediate level to the state level is permitted, and parents may further appeal the state's decision in state or federal court. 20 U.S.C. § 1415(e) (2).

Among the most important substantive requirements of the IDEA is the obligation to educate disabled children in the "least restrictive environment" in which they can receive an appropriate education. To that end, 20 U.S.C. § 1412(5)(B) provides in pertinent part:

> [T]o the maximum extent appropriate, children with disabilities . . . [must be] educated with children who are not disabled, and . . . special classes, separate

> schooling, or other removal of children with disabilities from the regular educational environment [shall] occur[] only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . .

This requirement is known as the "least restrictive environment" or "LRE" requirement.[9]

A. LRE STANDARDS

The Supreme Court has not addressed how courts evaluate whether the LRE requirement of section 1412(5)(B) has been met. Three standards have emerged from the circuit courts. *See generally* Dixie Snow Huefner, *The Mainstreaming Cases: Tensions and Trends for School Administrators*, 30

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[9] The term "mainstreaming" is also frequently used, often interchangeably, with the term LRE. In fact, they are different. "Mainstreaming" means placing disabled children in regular classrooms, with non-disabled children. The IDEA does not require mainstreaming in all cases; "rather, it requires that each student be educated in an environment that is the least restrictive possible and that removal from general education occurs only when absolutely necessary. " Allan G. Osborne, Jr., *The IDEA's Least Restrictive Environment Mandate: A New Era*, 88 EDUC. L. REP. 541 (1994). The term "inclusion" is increasingly favored over the term "mainstreaming" because "mainstreaming connotes 'the shuttling of the disabled child in and out of the regular class without altering the class to accommodate the child.'" Abigail L. Flitter, *Civil Rights--A Progressive Construction of the Least Restrictive Environment Requirement of the Individuals with Disabilities Education Act--Oberti ex. rel. Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993)*, 67 TEMP. L. REV. 371 n.5 (1994) (quoting *Oberti*, 995 F.2d at 1207 n.1).

EDUC. ADMIN. Q. 27 (1994); Ralph E. Julnes, *The New Holland and Other Tests for Resolving LRE Disputes*, 91 EDUC. L. REP. 789 (1994).[10] While the Murrays urge us

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[10] The Third, Fifth and Eleventh Circuits have adopted what is called the *Daniel R.R.* test, following *Daniel R.R. v. Board of Educ.*, 874 F.2d 1036 (5th Cir. 1989): the court first determines "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily . . . [and, if not] whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* at 1048; *see also Oberti v. Board of Educ.*, 995 F.2d 1204, 1215 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991).

Courts consider the following factors in determining whether the first prong of the test has been met: (1) what steps the school has taken to accommodate the child in the regular classroom; (2) whether the child will receive an educational benefit from regular education; (3) the child's overall educational experience in regular education; and (4) the effect on the regular classroom of the disabled child's presence in the classroom. *Daniel R.R.*, 874 F.2d at 104849. The *Oberti* and *Greer* courts have combined the second and third factors into a comparison of the educational benefits of the regular classroom with those of the special education classroom. *See Oberti*, 995 F.2d at 1216; *Greer*, 950 F.2d at 697. *Greer* also permitted a consideration of the cost of any supplemental aids and services required for placement in the regular classroom. *Greer*, 950 F.2d at 697.

The Fourth, Sixth and Eighth Circuits apply what is called the *Roncker* test, named after *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983): "[W]here the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a nonsegregated setting. If they can, the placement in the segregated school would be inappropriate under the Act." *Id.* at 1063; *see also Devries* [sic] *v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989); *A.W. v. Northwest R-I Sch. Dist.*, 813 F.2d 158, 163 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987). The factors to be considered under *Roncker* are: (1)

to adopt one of these standards, as we discuss further *infra*, we need not do so to resolve this case.

B. JUDICIAL REVIEW IN IDEA CASES

As indicated, parents may challenge a school district placement decision through the due process hearing proceeding and subsequent appeal to the state administrative level, followed by further appeal to the federal district court. *See* 20 U.S.C. § 1415(e)(2).

1. Standard of Review

The Ninth Circuit recently observed that "judicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferen-

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the benefits the child would receive from the special education classroom as compared with those from the regular classroom; (2) whether the child would be disruptive in the regular classroom; and (3) the cost of maintaining the child in the regular classroom. *Roncker*, 700 F.2d at 1063.

The Ninth Circuit has approved a test applying factors from both *Daniel R.R.* and *Roncker*: to determine whether a child is appropriately placed, the court applies a four-factor balancing test: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the child] ha[s] on the teacher and children in the regular class; and (4) the costs of mainstreaming [the child]." *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir.), *cert. denied*, 114 S. Ct. 2679 (1994); *see also Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1401 (9th Cir. 1994). The Ninth Circuit has not expressly adopted the second prong of the *Daniel R.R.* test–if education in the regular classroom, with supplemental aids and services, cannot be satisfactorily achieved, has the child nonetheless been mainstreamed to the maximum extent appropriate?

tial standard of review." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 90 (1994). The IDEA specifically requires a district court reviewing a challenge under the IDEA to "receive the records of the administrative proceedings, . . . hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence," grant any appropriate relief. 20 U.S.C. § 1415(e)(2). Thus, the court does not use the substantial evidence standard typically applied in the review of administrative agency decisions, "but instead must decide independently whether the requirements of the IDEA are met." *Board of Educ. v. Illinois State Bd.*, 41 F.3d 1162, 1167 (7th Cir. 1994).

However, "[t]he fact that § 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings." *Rowley*, 458 U.S. at 206 (quoting 20 U.S.C. § 1415(e)(2)). The district court must therefore independently review the evidence contained in the administrative record, accept and review additional evidence, if necessary, and make a decision based on the preponderance of the evidence, while giving "due weight" to the administrative proceedings below. This has been described as a "modified *de novo* review," *Doe v. Board of Educ.*, 9 F.3d 455, 458 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994), or as "involved oversight." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1087 (1st Cir. 1993) (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989 (1st Cir. 1990), *cert. denied*,

499 U.S. 912 (1991));[11] *cf. Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993) ("district court's review of the hearing officer's decision is virtually *de novo*").

In this case, we review the district court's grant of summary judgment to the District.[12] We review the grant

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[11] The First Circuit has carefully described the district court's obligation as one designed to render a "bounded independent decision[]—bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court." *Roland M.*, 910 F.2d at 990 (quoting *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 791 (1st Cir. 1984), *aff'd on other grounds*, 471 U.S. 359 (1985)); *see also Ojai Unified Sch. Dist.*, 4 F.3d at 1473-74. In *Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1026 n.2 (10th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991), we noted that courts need not "assume deference to the administrative hearing officer's decision under the Act. . . ." *Cf. Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) ("findings of fact by the hearing officers . . . are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it."); *see also Combs v. School Bd.*, 15 F.3d 357, 361 (4th Cir. 1994) (giving "deference to the findings of the original administrative factfinder," and holding that "[w]hen both the original hearing officer and the state review officer agree on issues, . . . even greater deference is due").

[12] While our research reveals that summary judgment is not frequently granted in IDEA cases, there is no prohibition against it. "Nothing in the language or legislative history of the [IDEA] suggests that Congress intended to dispense with the 'wholesome utility' of summary judgment." *Victoria L. v. District Sch. Bd.*, 741 F.2d 369, 372 (11th Cir. 1984); *see also Ojai Unified Sch. Dist.*, 4 F.3d at 1472 n.6 (stating the court did not suggest "that summary judgment could never be

of summary judgment *de novo*, applying the same standard as did the district court. *Johnson*, 921 F.2d at 1025. Thus, summary judgment is only appropriately granted if "'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" Id. (quoting FED. R. CIV. P. 56(c)). We examine the facts and draw any inferences therefrom in favor of the non-moving party. We of course review *de novo* the district court's interpretation of the statutes at issue. *See Dell v. Board of Educ.*, 32 F.3d 1053, 1058 (7th Cir. 1994).

II. ISSUES IN THIS CASE

The Murrays argue: (1) the LRE requirement of section 1412(5)(B) includes a strong rebuttable presumption that the LRE is in the neighborhood school, with supplementary aids and services; (2) the Ninth Circuit's LRE standard is the proper standard for evaluating compliance with the IDEA's LRE requirement and under that standard, the district court's decision granting summary judgment to the District was erroneous; (3) the district court erred in not permitting the Murrays to introduce additional evidence of Tyler's progress after the due process hearing and of possible supplementary aids and services. In its cross-appeal, the District argues the district court erred in not granting its first motion for summary judgment. The Murrays seek dismissal of the cross-appeal, arguing the District lacks standing since it prevailed. We hold that a single legal issue controls the outcome of this case--whether the LRE mandate of section 1412(5)(B) includes a presumption that the LRE is in the neighborhood school with supplementary aids and services.

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used in IDEA cases").

We hold that it does not. For reasons more fully discussed below, we need not address the Murrays' other arguments.

A. IS THERE A PRESUMPTION OF NEIGHBORHOOD SCHOOLING IN LRE?

The Murrays argue that the LRE mandate includes a presumption that the LRE is in the neighborhood school, with supplementary aids and services. They rely upon the "plain meaning" of the statute; the 1973-1975 legislative history of the IDEA; the wording of two regulations implementing the IDEA; and the 1982-1983 legislative history of the IDEA. We reject these arguments.

The statute requires that

> to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . .

20 U.S.C. § 1412(5)(B). The Murrays argue that "regular educational environment" implicitly includes neighborhood schools, that "special classes" means non-regular classes; and that "separate schooling" means non-neighborhood schools. They further argue that because Congress has declared that "the neighborhood is the appropriate basis for determining public school assignments," 20 U.S.C. § 1701(a)(2), then the reference to "removal" in section 1412(5)(B) must mean removal from the neighborhood school. Thus, they argue that "supplementary aids and services" must be fully ex-

plored before a child is removed from *both* the neighborhood school *and* the regular classroom with nondisabled children.

This interpretation strains the plain meaning of the statute. The statute clearly addresses the removal of disabled children from classes or schools with nondisabled children. It simply says nothing, expressly or by implication, about removal of disabled children from neighborhood schools. In other words, while it clearly commands schools to include or mainstream disabled children as much as possible, it says nothing about where, within a school district, that inclusion shall take place.

The Murrays next argue that two implementing regulations make express what the statute merely implies. 34 C.F.R. § 300.552(a)(3) provides that "[t]he educational placement of each child with a disability [shall be] as close as possible to the child's home." 34 C.F.R. § 300.552(c) provides that state agencies must ensure that "[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." The Murrays assert that these two regulations create a presumption that the LRE is in the neighborhood school.

We disagree. A natural and logical reading of these two regulations is that a disabled child should be educated in the school he or she would attend if not disabled (i.e., the neighborhood school), *unless* the child's IEP requires placement elsewhere. If the IEP requires placement elsewhere, then, in deciding where the appropriate placement is, geographical proximity to home is relevant, and the child should be placed as close to home as possible. *See Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 153 (4th Cir.)

(the regulations "require[] only that a school board take into account, as one factor, the geographical proximity of the placement in making these decisions"), *cert. denied*, 502 U.S. 859 (1991); *Devries* [sic] *v. Fairfax County Sch. Bd.*, 882 F.2d 876 (6th [sic] Cir. 1989) (approving placement away from neighborhood school); *Urban v. Jefferson County Sch. Dist. R-1*, 870 F. Supp. 1558, 1568 (D. Colo. 1994) ("[T]he statutory preference for placement at a neighborhood school is only that--and it does not amount to a mandate."). There is at most a preference for education in the neighborhood school. To the extent the Third Circuit has expressly held in *Oberti* that the IDEA encompasses a presumption of neighborhood schooling, we disagree. *See Oberti*, 995 F.2d at 1224 n.31.[13]

The Murrays next argue that the voluminous legislative history surrounding the enactment of the statute, as well as the legislative history surrounding a subsequent proposal to amend certain implementing regulations and a resulting amendment to the IDEA, support their interpretation of the statute. We disagree.

With respect to legislative statements surrounding the enactment of the IDEA, they all present the same problem

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[13] Even *Oberti* appears to qualify the presumption: "There is thus a presumption in favor of placing the child, *if possible*, in the neighborhood school, and if that is not feasible, as close as home as possible." *Oberti*, 995 F.2d at 1224 n.31 (emphasis added). Further, as the District argues, *Oberti* was an inclusion case, involving a dispute over removing a disabled child from a regular classroom with nondisabled children to a self-contained classroom for children with disabilities. Removal from the neighborhood school, as a part of the removal from a regular to a special education classroom, was a secondary issue.

for the Murrays as the statute: they simply do not clearly indicate that Congress, in discussing mainstreaming or inclusion and the concept of the LRE for each disabled child, meant anything more than avoiding as much as possible the segregation of disabled children from nondisabled children. They in no way express a presumption that the LRE is always or even usually in the neighborhood school.

The Murrays fare little better with the legislative history surrounding the proposed amendment to certain implementing regulations in 1982 and 1983. In 1982 the Secretary of Education proposed amending some regulations, including 34 C.F.R. § 300.552(a)(3) requiring education as close as possible to a child's home. The regulations were ultimately not amended, but the IDEA was itself amended to include a prohibition against "any regulation . . . which would procedurally or substantively lessen the protections provided to children . . . as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to . . . least restrictive environment)[sic]." 20 U.S.C. § 1407(b). The Murrays cite various statements made in connection with the proposed amendments, as well as the fact of section 1407(b)'s enactment, to support their argument that the LRE concept includes a strong presumption in favor of neighborhood schools. We again reject this argument as simply insufficiently persuasive to overcome the plain meaning of the statute, and the absence therein of any reference to neighborhood schools. Accordingly, we hold that there is no presumption of neighborhood schooling, either in the IDEA or its implementing regulations.

The Murrays ask us to select an LRE standard from those proposed thus far by other circuit courts. We need not adopt

an LRE compliance standard in order to decide this case, and we therefore choose not to do so. This is so because we have held that the LRE mandate does not include a presumption of neighborhood schooling, and a school district accordingly is not obligated to fully explore supplementary aids and services before removing a child from a neighborhood school. It is only so obligated before removing a child from a regular classroom with nondisabled children. The Murrays have never objected to the degree to which Tyler was educated outside the regular classroom; they only challenge his removal from his neighborhood school. We therefore need not decide which standard this circuit would apply to determinations of whether the LRE requirement of section 1412(5)(B) has been met.

B. DID THE DISTRICT COURT ERR IN NOT TAKING ADDITIONAL EVIDENCE?

The Murrays argue the district court erred in failing to hear additional evidence as to (1) possible supplementary aids and services which could be implemented at Olathe and (2) Tyler's educational progress since the due process hearing.

1. Evidence of Supplementary Aids and Services

We have held, as a matter of law, that the obligation to explore supplementary aids and services prior to removing a child from a regular classroom does not apply independently to decisions to place children in non-neighborhood schools. The Murrays do not challenge Tyler's IEP insofar as it determined how much time Tyler should spend in a regular classroom, as compared with special education or resource classrooms. We therefore need not consider

whether there are additional supplementary aids and services which could be implemented to comply with section 1412(5)(B)'s LRE mandate, and a remand for additional evidence on this point is unnecessary.[14]

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[14] There is an additional reason why we would not reach the issue of supplementary aids and services, and why a remand for the receipt of additional evidence on it would be unnecessary. The Murrays failed to exhaust this issue, as they must normally do before they can seek judicial review under the IDEA. *See Association for Community Living*, 992 F.2d at 1043.

Before the IHO and the ALJ, the Murrays consistently argued that they believed Tyler was making adequate educational progress at Olathe and that Olathe was a more appropriate and beneficial placement for him socially. They did not argue that the District had failed to include him in a regular classroom as much as possible, nor did they specifically argue that there were supplemental aids and services which the District should have explored before recommending placement at Northside. Even if the District bore the burden of proving that Olathe had become inappropriate for Tyler and that a change to Northside was therefore necessary (an issue which we need not decide given our disposition of this case), the Murrays still had an obligation to raise any issue they believed was relevant to the determination of Tyler's appropriate placement and to make all arguments concerning the interpretation and application of the IDEA to their child. Allocation of burdens of production and persuasion does not relieve parties of their obligation to raise and articulate issues they wish to pursue later.

Further, in failing to argue this issue before the administrative tribunals, the Murrays "deprived this Court of the factual record necessary to review the alleged violations." *Garro v. Connecticut*, 23 F.3d 734, 738 (2nd [sic] Cir. 1994). Moreover, the issue of what kinds of supplementary aids and services would be feasible and helpful to Tyler is precisely the kind of technical issue on which expert administrative tribunals should rule first.

2. Tyler's Educational Progress Since the Due Process Hearing

The Murrays also argue that the district court should have heard additional evidence of Tyler's educational progress since the due process hearing before ruling on the parties' motions for summary judgment.

There is a division between the circuits on the meaning and scope of section 1415(e)(2)'s directive that a district court in an IDEA case "shall hear additional evidence at the request of a party."[15] Even under the more restrictive interpretation taken of "additional evidence" by the First and Ninth Circuits, arguably evidence relating to a child's

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[15] The First and Ninth Circuits have construed "additional" to mean "supplemental." "The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing." *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 790 (1st Cir. 1984), *aff'd on other grounds*, 471 U.S. 359 (1985); *see also Ojai Unified Sch. Dist.*, 4 F.3d at 1472-73.

The Sixth Circuit has subsequently expressly disagreed with the *Burlington* interpretation, "insofar as this language suggests that additional evidence is admissible only in limited circumstances, such as to supplement or fill in gaps in the evidence previously introduced . . . ." *Metropolitan Gov't v. Cook*, 915 F.2d 232, 234 (6th Cir. 1990). The *Cook* court held that "'[a]dditional' in its ordinary usage, implies something that is added, or something that exists by way of addition. To 'add' means to join or unite; the limitation on what can be joined inherent in the term 'supplement' is not present in the term 'add.'" *Id.*; *see also Mavis v. Sobol*, 839 F. Supp. 968, 979 (N.D.N.Y. 1993) (discussing First and Sixth Circuit positions).

educational progress subsequent to the due process hearing would be relevant to a determination of appropriate placement pursuant to an IEP. It would be "evidence concerning relevant events occurring subsequent to the administrative hearing." *Town of Burlington*, 736 F.2d at 790. Other courts have admitted such evidence. *See. e.g., Lenn*, 998 F.2d at 1088; *Greer*, 950 F.2d at 698; *Mavis*, 839 F. Supp. at 980.

However, we need not remand this case for such "additional evidence" because we agree with the District's contention that any necessity for doing so has been rendered moot by the evaluation and review of Tyler's IEP conducted in November 1993, pursuant to which Tyler was placed at Olathe.[16]

C. OTHER FACTUAL DISPUTES

Having determined that the district court made no legal error, and that it did not err in failing to take additional evidence, we are left with determining whether any genuine issues of material fact remained which precluded the grant of summary judgment on the record before the district court. The only disputed factual issue before the ALJ and the

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[16] While mootness is often raised in IDEA cases, and there has been a suggestion of it in this case, it is clear that the legal issue on which we have ruled in this decision has not been rendered moot by Tyler's placement at Olathe. Questions as to the appropriate interpretation of the LRE mandate of section 1412(5)(B) are obviously capable of repetition. *See Honig v. Doe*, 484 U.S. 305, 318 (1988); *Rachel H.*, 14 F.3d at 1403; *Daniel R.R.*, 874 F.2d at 1040.

district court was whether Tyler was making educational progress at Olathe such that placement there was appropriate under the IDEA. That issue has been rendered moot by Tyler's subsequent evaluation and IEP placing him at Olathe. It would serve no purpose to remand this case for further proceedings directed to resolving that issue, in light of his later evaluation and placement.

D. CROSS-APPEAL AND MOTION TO DISMISS

The District's cross-appeal from the district court's earlier denial of its motion for summary judgment has likewise been mooted by our affirmance of the district court's grant of summary judgment to the District. Having ruled in their favor, there is no additional relief we could provide the District. We therefore grant the Murrays' motion to dismiss the cross-appeal.

CONCLUSION

For the foregoing reasons, we AFFIRM the decision of the district court granting the District's motion for summary judgment and dismissing the case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 91-C-1608

TYLER MURRAY,
Plaintiff,

v.

MONTROSE COUNTY SCHOOL DISTRICT RE-1J,
Defendant.

ORDER

CARRIGAN, J.

Plaintiff Tyler Murray, through his parents, John and Myrna Murray, commenced this action alleging violations of (1) the Individuals with Disabilities Education Act (IDEA) (formerly Education for all Handicapped Children Act), 20 U.S.C. §§ 1400, *et seq.* (first claim); and (2) section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (second claim). Plaintiff, a disabled child, appeals the decision of an Administrative Law Judge (ALJ), who ordered him placed at an elementary school other than the one preferred by his parents.

Pursuant to Fed. R. Civ. P. 56 the plaintiff has moved for summary judgment. Defendant, Montrose County School

District RE-1J (District), has responded by opposing that motion. Pursuant to Fed. R. Civ. P. 12(b) and 56(b), the defendant has moved to dismiss in part, or, alternatively, for partial summary judgment. Plaintiff has responded by opposing the motion.

The parties fully briefed the issues and oral argument has been heard. Jurisdiction exists under 20 U.S.C. § 1415(e)(4)(A).

I. FACTS.

The following facts are undisputed: Tyler Murray is a nine year old boy who has attended Olathe Elementary School (Olathe), located approximately five blocks from his home, since he enrolled in kindergarten. He has multiple disabilities, including physical and speech impairments and limited intellectual capacity. In April 1988, before Tyler began school at Olathe, Tyler's parents and a multi-disciplinary team of teachers, speech and physical therapists developed an "individualized education program" (IEP) for him as required by 20 U.S.C. § 1401(a)(19). The IEP indicated Tyler should receive "special related services," as defined in 20 U.S.C. § 1401(a)(17). As recommended in his IEP, Tyler divided his time between the regular classroom and his therapists.

Once Tyler began school, the team periodically reviewed and updated his IEP. Some team members expressed concern whether the resources available at Olathe were sufficient and suggested that Northside Elementary School (Northside), with its "severe/profound needs program," would be more appropriate for Tyler. Northside is located in Montrose, Colorado, approximately ten miles from

Tyler's home in Olathe. Tyler's parents have continuously expressed their desire that he remain at Olathe Elementary.

At a triennial review of Tyler's program in November 1990, the two special education teachers who worked with Tyler stated that he had not yet mastered any of the first grade curriculum and that the gap between his educational achievements and those of the other children in his class was widening. Although Tyler's parents and the other team members agreed that Tyler's special needs dictated that he receive special education services almost exclusively, with very little time in the regular classroom, they disagreed once again about the best location for implementation of those goals. After extensive discussion and a disputed vote on the appropriate placement for Tyler, the meeting adjourned without a decision.

In December 1990, the school district's special education director notified Tyler's parents that he would be placed at Northside. The parents were advised at that time of their right to appeal under 20 U.S.C. § 1415.

Tyler's parents did appeal, requesting a due process hearing, as well as an independent educational and psychological evaluation of Tyler. The team completely reviewed and updated Tyler's IEP in light of that evaluation. While some team members again recommended the Northside program for Tyler, his parents continued to demand that he remain at Olathe.

The due process hearing took place in March 1991 with Tyler's teachers, parents and the District officials involved in developing his IEP. Tyler and his parents were represented by counsel. The hearing officer allowed Tyler to remain

at Olathe.

The District appealed that decision to an ALJ, pursuant to 20 U.S.C. § 1415(c). In September 1991, the ALJ found in favor of the District. Tyler's parents appealed the ALJ's decision to this court under 20 U.S.C. § 1415(e)(2).

II. The IDEA.

In order to receive federal funds under the IDEA, states must provide every disabled child a "free appropriate public education." 20 U.S.C. §§ 1400(c), 1414(b)(2)(A) and 1416. Each child who has a "specific learning disability" is required to have an IEP developed by a team that includes education professionals, a parent or guardian and, where appropriate, the disabled individual. 20 U.S.C. §§ 1401(a)(15) and 1401(a)(19).

Procedural safeguards outlined in 20 U.S.C. § 1415 assure that disabled children and their parents have a voice in the process of determining the child's IEP. When parents challenge a school district's placement decision they are entitled to state administrative review and additional review in either federal or state district court.

Review by the district court of an ALJ's findings of fact and conclusions of law is *de novo*. *A. E. v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 475 (10th Cir. 1991) (quoting *Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990)). District courts may hear testimony not presented before the state agency. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 997 (1st Cir. 1990). However, a party may not willfully exclude from the administrative hearing matters that it plans to bring up at trial. *Id.* A district court, in recognition of the expertise of

the administrative agency, is to consider carefully the ALJ's findings and respond to each issue decided. *Burlington v. Department of Educ.*, 736 F.2d 773, 792 (1st Cir. 1984). After such a review, the court is free to accept or reject the findings in whole or in part. *Id.*

The IDEA provides that when an appeal is taken a court is to "receive the records of the administrative proceedings, . . . hear additional evidence at the request of a party, and, [base] its decision on the preponderance of the evidence." 20 U.S.C. § 1415(e)(2).

This court's inquiry under the last cited section is twofold:

> "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

III. Plaintiff's Motion for Summary Judgment.

Plaintiff moves for summary determination that the following three rules of law will apply in this case:

> "(1) Neighborhood schooling is required when 'possible.' 34 C.F.R. § 300.552(a)(3). *See also* 20 U.S.C. §§ 1407(b) and 1412(5)(B). What is 'possible' is what is otherwise legally permissible under IDEA.
>
> (2) If the neighborhood school can provide an appropriate education, then placement at that school is required. Thus, as between two appropriate schools, IDEA requires placement

> at the school closest to the child's home. 34 C.F.R. § 300.552(a)(3). *See also* 20 U.S.C. §§ 1407(b) and 1412(5)(B).
>
> (3) In deciding whether a school is appropriate, the Court may inquire into what supplementary aids and services are or could be available to improve the program at that school. 20 U.S.C. § 1412(5)(b)."

Plaintiff requests that this court, without reference to the specific facts of this case, adopt these three statements as "rules of law governing further proceedings, including trial in this matter." The court concludes, however, that this is not an appropriate matter for summary determination pursuant to a Fed. R. Civ. P. 56 summary judgment motion because no judgment would result.

This court declines to decide issues neither raised in the complaint nor raised below at the administrative level. It is revealing that in this administrative appeal, the plaintiff has complained of no error on the part of the ALJ, but rather has asked this court to make broad pronouncements of law that go well beyond the issues presented at the administrative level.

Accordingly, the plaintiff's motion for partial summary judgment will be denied.

IV. Defendant's Motion to Dismiss or for Summary Judgment.

A. First Claim.

Plaintiff's first claim for relief alleges that the defendant has failed to comply with the procedural requirements of 20 U.S.C. § 1412(5)(B). That subsection provides that states must establish procedures:

> "to assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

Defendant contends that this statute applies only to the issue of "mainstreaming" disabled students into regular classrooms, not to issues of which school is proper for disabled students to attend. Therefore, the defendant argues that this statute is irrelevant to the neighborhood school question presented in this case and for that reason this claim fails to state a claim upon which relief can be granted.

Plaintiff, in essence, argues that a regulation promulgated pursuant to this statute mandates neighborhood schooling. 34 C.F.R. § 300.552. However, it is well established that the IDEA and regulations adopted pursuant to it do not mandate that a school district place handicapped children at the elementary schools nearest to their homes. *See, e.g.,*

Schuldt v. Mankato Sch. Dist. No. 77, 937 F.2d 1357, 1361 (8th Cir. 1991).

Accordingly, the defendant is entitled to summary judgment on this portion of the plaintiff's first claim, and it will be dismissed.

Plaintiff's first claim also alleges that the school district committed a procedural violation in the placement decision by allowing the Director of Student Services, rather than a majority of staffing team members, to make the placement decision. (Amended Complaint ¶ 29.) The placement vote at issue is required by the Montrose Public. School's Special Services Comprehensive Plan and Procedure Manual § III(D)(10) (the Manual). The procedures set out in the Manual are incorporated in the Colorado State Plan at 91 Colorado State Plan Part II, § III(B)(2), which in turn is made a part of the state's IDEA provisions.

Defendant has moved for summary judgment on this portion of the first claim contending that the applicable procedures were not violated. The primary issue is whether a majority of the staffing team members voted to place the plaintiff at Olathe Elementary on November 27, 1990. At the meeting during which the vote took place, five district staffing team members voted for placement at Northside, and three for placement at Olathe. In addition, the plaintiff's parents voted for placement at Olathe. Plaintiff's contention is that the applicable regulations require that each parent's vote should count, creating a tie and thus precluding a majority.

Plaintiff has identified only the provision in the Manual that placement be based on a majority vote of the staffing

team. Nothing in that manual indicates that each participating parent is to be accorded a vote. No provision of the IDEA or its implementing regulations supports the plaintiff's contention. School districts are required only to provide the opportunity for one or both parents to participate in the development of the IEP and to assure that placement decisions are made by a group of persons knowledgeable about the child. 34 C.F.R. §§ 300.344, 300.345, 300.533. Plaintiff has not established that a genuine issue of material fact exists as to this claim. Accordingly, the defendant's motion for summary judgment on this portion of the first claim will be granted.

B. Second Claim.

Plaintiff's second claim is brought pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. A private right of action exists under this statute. *Pushkin v. Regents of Univer. of Colo.*, 658 F.2d 1372, 1376-80 (10th Cir. 1981). Here the plaintiff alleges violations of three separate regulations promulgated under 29 U.S.C. § 794.

1. Violation of 34 C.F.R. 104.34(a).

The regulations, in 34 C.F.R. 104.34(a), state in pertinent part that:

> "[The district] shall place a handicapped person in the regular educational environment. . . unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."

This claim alleges a substantive violation of the regulation by not placing the plaintiff at the neighborhood school. In all other respects, it is a restatement of the first portion of the plaintiff's first claim.

This regulation mirrors the requirements of the regulation promulgated under § 1412(5)(B) of the IDEA, upon which the first claim is brought. Plaintiff has not cited any supporting authority for its contention that this regulation applies to the placement decision here at issue. Accordingly, this portion of the second claim will be dismissed for the same reasons that the first portion of the first claim will be dismissed.

2. Violation of 34 C.F.R. 104.35(c).

The regulations, in 34 C.F.R. 104.35(c), state that:

> "In interpreting evaluation data and in making placement decisions, [the state or school district] shall (1) draw upon information from a wide variety of sources . . . (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the data, and the placement options, and (4) ensure that the placement decision is made in conformance with § 104.34."

Section 104.34, 34 C.F.R., mandates education:

> "to the maximum extent appropriate to the needs of the handicapped person [and placement] in the regular educational environment . . . unless demonstrated . . . that education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment, . . . it shall take into account the proximity of the alternate setting to the person's home."

In this claim, the plaintiff is alleging the same procedural violation as he pleads in the second portion of the first claim--*i.e.*, that there was no majority vote in favor of-the placement decision. (*See* letter from plaintiff to the court of 5/14/93).

Summary judgment shall be granted on this portion of the second claim for the same reason that the defendant's motion for partial summary judgment was granted on the second portion of the plaintiff's first claim.

3. Violation of 34 C.F.R. § 104.4.

The regulations, in 34 C.F.R. § 104.4, contain a general prohibition against discrimination stating, in pertinent part, that:

> "No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or

> otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance."

Plaintiff contends that the defendant's placement decision denied him the benefits of a program or activity that receives federal financial assistance. This regulation merely reiterates the general nondiscrimination prohibition of 29 U.S.C. § 794.

The allegation does not state a claim upon which relief can be granted. It is undisputed that the defendant has not excluded the plaintiff from participation in any "program or activity" by its placement decision. Defendant has offered a program at a school other than the plaintiff's neighborhood school, and has placed the plaintiff in that program. Failure to provide all specialized programs at each school location does not violate 29 U.S.C. § 794. *See Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 155 (4th Cir. 1991). Nor does it violate 34 C.F.R. § 104.4.

Plaintiff has provided no legal basis for equating a particular school within an individual district with a "program" under this regulation. Accordingly, the defendant's motion to dismiss this portion of the second claim will be granted.[1]

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[1] Defendant also has moved to dismiss or for summary judgment on claims raised in the pretrial order but not mentioned in the complaint. Plaintiff responds that there are no new claims in the pretrial order.

Plaintiff attempts to bootstrap into this case broad legal and factual questions well beyond the scope of the issues surrounding Tyler Murray's placement. Because of the confusion created by the plaintiff's sometimes incoherent pretrial order and briefs on these motions, at oral argument I ordered the plaintiff's counsel to submit a letter detailing precisely

Accordingly IT IS ORDERED that:

(1) Plaintiff's motion for partial summary judgment is denied;

(2) Defendant's motion to dismiss or in the alternative for partial summary judgment is granted; and

(3) The ALJ's decision is affirmed, and the plaintiff's claims and action are dismissed.

Dated at Denver, Colorado October 21, 1993.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES
DISTRICT JUDGE

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which claims are raised by the complaint.

In that letter, dated May 14, 1993, the plaintiff attempted to clarify the specific claims in his amended complaint. Plaintiff also has provided four general claims that he wishes this court to decide. To the extent that these claims were raised in the complaint and at the administrative level, they have been addressed here. However, as noted above, this court will not accept the plaintiff's attempt to adjudicate issues that are not properly presented in this administrative appeal.

IN THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R.CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order and Judgment signed by Judge Carrigan to:

Gerald Caplan, Esq.
2595 Canyon Blvd. #400
Boulder, CO 80302-6737

Chester Chapman, Esq.
455 Sherman St. #130
Denver, CO 80203

/s/ Carol Henderson
Deputy Clerk
Dated: October 21, 1993
Re: 91-C-1608

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-C-1608

TYLER MURRAY,

Plaintiff,

v.

MONTROSE COUNTY SCHOOL DISTRICT RE-1J,

Defendant.

JUDGMENT

Pursuant to and in accordance with the Order signed October 21, 1993 by the Honorable Jim R. Carrigan, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that the Administrative Law Judge's decision is affirmed, and the plaintiff's claims and this action are hereby dismissed.

DATED at Denver, Colorado this 21st day of October, 1993.

FOR THE COURT:
JAMES R. MANSPEAKER, CLERK

By: /s/ Stephen P. Ehrlich
Stephen P. Ehrlich,
Chief Deputy Clerk

IN THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-C-1608

Tyler Murray, by and through his parents and next friends, John and Myrna Murray

Plaintiff,

v.

Montrose County School District RE-1J, a School District of the State of Colorado

Defendant.

ORDER

Carrigan, J.

Plaintiff Tyler Murray, through his parents, John and Myrna Murray, commenced this action under the Individuals with Disabilities Education Act (IDEA) (formerly Education for all Handicapped Children Act), 20 U.S.C. §§ 1400, *et seq*. Plaintiff, a disabled child, appeals the decision of an Administrative Law Judge (ALJ), who ordered him placed in an elementary school other than the one preferred by his parents. Pursuant to FED. R. CIV. P. 56 the defendant,

Montrose County School District RE-1J (District), has moved for summary judgment. Plaintiff has responded by opposing the motion.

The parties have fully briefed the issues and oral argument would not be helpful. Jurisdiction exists under 20 U.S.C. § 1415(e)(4)(A).

I. FACTS.

The following facts are undisputed: Tyler Murray is a nine year old boy who has attended Olathe Elementary School (Olathe), about five blocks from his home, since he enrolled in kindergarten. He has multiple disabilities, including physical and speech impairments and limited intellectual capacity. In April 1988, before Tyler began school at Olathe, a multi-disciplinary team of teachers, speech therapists, physical therapists and Tyler's parents developed an "individualized education program" (IEP) for Tyler as required by 20 U.S.C. § 1401(a)(19). The IEP indicated that Tyler should receive "special related services," as defined in 20 U.S.C.§ 1401(a)(17). As recommended in his IEP, Tyler divided his time between the regular classroom and his therapists.

Once Tyler began school, the team periodically reviewed and updated his IEP. Some team members expressed concern about the resources available at Olathe and suggested that Northside Elementary School (Northside) would be more appropriate for Tyler because it has a program for children with severe/profound needs. Northside is located in Montrose, Colorado, approximately ten miles from Tyler's home in Olathe. Tyler's parents have continuously expressed their desire that the child remain at Olathe.

At a triennial review of Tyler's program in November 1990, the two special education teachers who had worked with Tyler stated that he had not yet mastered any of the first grade curriculum and that the gap between his educational achievements and those of the other children in his class was widening. Although Tyler's parents and the other team members agreed that his special needs dictated that he receive special education services almost exclusively, with very little time in the regular classroom, they persisted in their preference that those goals be sought at Olathe. After extensive discussion and a disputed vote on the appropriate placement, the meeting adjourned without a decision.

In December 1990, the school district's special education director notified Tyler's parents that Tyler would be placed at Northside. He advised them at that time of their right to appeal his decision under 20 U.S.C. § 1415.

Tyler's parents appealed, requesting a due process hearing, as well as an independent educational and psychological evaluation. The team completely reviewed and updated Tyler's IEP in light of that evaluation. While some team members again recommended the Northside program, Tyler's parents continued to prefer Olathe.

In March 1991, the due process hearing took place. The entire team that had developed Tyler's IEP, including his teachers, parents and District officials, as well as the hearing officer and counsel for Tyler and his parents, were present. The hearing officer decided to allow Tyler to remain at Olathe.

The District appealed that decision to an ALJ, pursuant to 20 U.S.C. § 1415(c). In September 1991, the ALJ found in

favor of the District. Tyler's parents appealed the ALJ's decision to this court under 20 U.S.C. § 1415(e)(2) asserting that:

(1) procedural errors occurred during the review process; and

(2) the Northside placement is not appropriate for Tyler.

II. SUMMARY JUDGMENT STANDARD AND ANALYSIS.

Summary judgment is proper if the pleadings, depositions and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); FED. R. CIV. P. 56. The party opposing a properly supported summary judgment motion may not rest upon the mere allegations of the complaint, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A factual dispute is material only if, under the governing law, its resolution might affect the action's outcome. A factual dispute is genuine only if a reasonable fact finder could return a verdict for the non-moving party. *Id.* Summary judgment is not favored in IDEA cases. *Barwacz v. Michigan Department of Education*, 674 F. Supp. 1296, 1301 (W.D. Mich., 1987).

A. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

In order to receive federal funds under the IDEA, states must provide all disabled children "free appropriate public

education." 20 U.S.C. §§ 1400(c), 1414(b)(2)(A) and 1416. Every child who has a "specific learning disability" is required to have an IEP developed by a team that includes education professionals, a parent or guardian and, where appropriate, the disabled individual. 20 U.S.C. §§ 1401(a)(15) and 1401(a)(19).

Procedural safeguards outlined in 20 U.S.C. § 1415 assure to disabled children and their parents a voice in the process of determining the child's IEP. When parents challenge a school district's placement decision they are entitled to state administrative review and additional review in either federal or state district court.

Review by the district court of an ALJ's findings of fact and conclusions of law is *de novo*. *A.E. v. Indep. School Dist. No. 25*, 936 F.2d 472, 475 (10th Cir. 1991) (quoting *Johnson v. Indep. School Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990)). District courts may hear testimony not presented before the state agency. *Roland M. v. Concord School Committee*, 910 F.2d 983, 997 (1st Cir. 1998) [sic]. However, a party may not willfully exclude from the administrative hearing matters that it expects to raise at trial. *Id.* A district court, in recognition of the administrative agency's expertise, is to consider the ALJ's findings carefully and respond to each issue decided. *Burlington v. Department of Education*, 736 F. 2d 773, 792 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). After such a review, the court is free to accept or reject the findings in whole or in part. *Id.*

The IDEA provides that when an appeal is taken a court is to "receive the records of the administrative proceedings, . . . hear additional evidence at the request of a party, and, bas[e] its decision on the preponderance of the evidence. "

20 U.S.C. § 1415(e)(2).

This court's inquiry under that section is twofold:

> "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982).

1. Procedural Challenges.

Plaintiff, in his amended complaint, contends that two procedural requirements of the IDEA have not been met. First, he asserts that the District refused to explore, to the maximum extent appropriate, the use of supplementary aids and services as required under 20 U.S.C. § 1412(5)(B). Next, he maintains that the placement decision was not made pursuant to a majority vote of his evaluation team.[1] (Affidavit of Myrna Murray, ¶ 10).

Defendant responds that the plaintiff may not raise the issue of supplementary aids for the first time on this appeal. Moreover, the defendant claims it is undisputed that the District repeatedly intensified special education services in an effort to educate Tyler at Olathe. Defendant also argues that the plaintiff may not raise the issue of the team majority vote in this proceeding since he failed to litigate that issue at the

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[1] Such a vote is required by the Montrose Public School's Special Services Comprehensive Plan and Procedure Manual, § III(D)(10), which is incorporated in the Colorado State Plan at 91 Colorado State Plan Part II, § III(B)(2), which is in turn made a part of the state's IDEA provisions.

ALJ hearing. Further, the defendant argues, the ALJ found the vote for a Northside placement to be an undisputed fact.

Where, as here, there is no evidence that the plaintiff willfully failed to raise up these issues at the administrative hearing, they can be considered on appeal. Moreover, the parties have yet to present evidence on the issue of supplementary aids and services. Conflicting evidence has been presented concerning whether a majority vote on Tyler's placement occurred. Accordingly, I conclude that genuine issues of material fact still exist as to whether the procedural requirements of the IDEA have been met, and therefore summary judgment would be inappropriate.

2. Substantive Challenges to the IEP.

Plaintiff argues, *inter alia*, that the following changed circumstances since the time of the hearing render placement at Olathe appropriate for Tyler: (1) as a result of recent architectural changes, the Olathe school is now fully handicapped-accessible; (2) the student teacher ratio at Olathe has improved; and (3) Tyler has made significant educational progress since the November 1990 hearing.

Defendant asserts that these changed circumstances are immaterial since they were not the basis for the placement decision. Rather, the defendant contends that the ALJ based his decision solely on Northside's special severe/profound needs program.

Factors to be considered by a court reviewing a child's IEP to determine whether it is appropriate include: (1) the child's degree of impairment and rate of progress, (2) the child's behavioral or physical problems and ability to interact with non-disabled children, (3) the availability of alternative

resources, (4) the student/teacher ratio, and (5) the child's curriculum. *See Johnson*, 921 F.2d at 1027; *Colin v. Schmidt*, 715 F.2d 1, 6 (1st Cir. 1983). Evidence concerning relevant events occurring subsequent to the administrative hearing is a proper matter for the court's attention on review. *Burlington*, 736 F.2d at 790.

Changed circumstances, both at Olathe and in Tyler's development, are relevant to the determination whether Northside is the appropriate placement. Plaintiff has brought to this court's attention substantial and potentially critical changes in these areas that preclude summary judgment. It is simply not clear which placement is appropriate for Tyler; presentation of additional evidence would assist the court in this determination.

B. CONCLUSION.

After reviewing the briefs and evidence submitted, I find and conclude that a number of genuine issues of material fact are still in dispute concerning both procedural defects and the appropriate placement for Tyler. As a result, the defendant's motion for summary judgment will be denied.

Accordingly, IT IS ORDERED that:

(1) Defendant's motion for summary judgment is denied; and

(2) The parties and their counsel are ordered to meet and confer within eleven days of this order in a good faith attempt to settle the case without further litigation, expense or delay. The parties shall report to this court in writing within fifteen days of this order, stating the results of their settlement negotiations and whether a conference before a

Magistrate Judge or some other alternative dispute resolution proceeding, would facilitate settlement.

Dated at Denver, Colorado April 14, 1992.

BY THE COURT:

/s/Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

Chester Chapman, Esq.
455 Sherman St. #130
Denver, CO 80203

Susan Schermerhorn, Esq.
2595 Canyon Blvd. #400
Boulder, CO 80302-6703

/s/Lucy Flis
Deputy Clerk

Dated: April 14, 1992

Re: 91-C-1608

BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. ED 91-06

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DECISION UPON STATE LEVEL REVIEW

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MONTROSE COUNTY SCHOOL DISTRICT RE-1J,
Appellant,

v.

JOHN AND MYRNA MURRAY in the Interest of
TYLER MURRAY, a minor,

Appellees.

==========

This matter was submitted to Don P. Stimmel, Administrative Law Judge, State Department of Administration, for review of the decision of Gordon F. Esplin, Impartial Hearing Officer, under appropriate rules and statutes. Submission was concluded on August 9, 1991. Appellant[1] was represented by Susan S. Schermerhorn. Attorney at Law, of Caplan & Earnest, Boulder, Colorado; Appellees[2] were represented by Randy Chapman, Attorney at Law, of the Legal Center Serving Persons with Disabilities, Denver, Colorado.

In the text of this decision, the Administrative Law Judge

uses the following abbreviations or other designations:

Designation	Meaning
A.L.J.	Administrative Law Judge
I.H.O.	Impartial Hearing officer (Mr.Esplin)
The District	Montrose County School District RE-1J
Olathe School	Olathe Elementary School, Olathe, Colorado
Northside	Northside Elementary School, Montrose, Colorado
The Child or "T.M."	Tyler Murray
The Father	John Murray
The Mother	Myrna Murray
The Parents	John and Myrna Murray, collectively
Appellees	The Child and Parents, collectively
The Department or CDE	Colorado Department of Education
SEA	State Educational Agency
LEA	Local Educational Agency
F.A.P.E.	Free Appropriate Public Education
I.E.P.	Individualized Education Plan
CP	Cerebral palsy
SLIC	Significantly Limited Intellectual Capacity (handicapping condition)
PH	Physical handicap or physically handicapped (of a student)
MHS	Multiple Handicapped student
ESY	Extended School Year

staffing	Meeting of teachers, administrators and parents concerning placement, I.E.P. or related matters for special education student
S/L	Speech/language services for handicapped children
L.R.E.	Lease [sic] Restrictive Environment
Mainstreaming	Inclusion of handicapped child with non-handicapped children in regular classes
Resource (Usually with "room" "teacher")	Special education service in which child receives supplemental assistance from special education teacher to supplement regular education classes
OT	Occupational Therapy
PT	Physical Therapy
S/P	Severe to profound (categorization of child needs or program [sic]
M/M	Mild to Moderate (categorization of child needs or program [sic]
I.Q.	Intelligence quotient
WISC-R	Wechsler Intelligence Scale to Children--Revised (standard intelligence test)
S-BIS	Stanford-Birot [sic] Intelligence Scale (standard intelligence test)
grade level	State of academic progress or achievement expected of students at a given stage of school work, or content level at which students are taught

CEEM	Colorado Effective Education Model
U.S.C.	United States Code
C.F.R.	Code of Federal Regulations
C.R.S.	Colorado Revised Statues [sic]
CCR	Code of Colorado Regulations
IDEA or "The Act"	Federal Individuals with Disabilities Education Act (formerly Education for all Handicapped Children Act) 20 U.S.C §§ 1401 *et seq.*
Federal Regulations	Regulations relating to implementation of the IDEA, 34 C.F.R. part 300
ECEA or the "State Act"	Colorado Exceptional Children's Education [sic] Act, C.R.S. Title 22, Article 20
State Regulations	Rules implementing the State Act, 1 CCR 301-8
State Plan	Colorado State Plan for implementing the IDEA (1989-91 version)
APA	Colorado Administrative Procedure Act, C.R.S., Title 24, Article 4

PROCEDURAL HISTORY

An evidentiary [sic] was held before the I.H.O. on March 25, 26 and 27, 1991, in Montrose. The I.H.O. issued a decision on April 10, 1991, in favor of Appellees. The District, through counsel, submitted an appeal in the form of a letter to the Executive Director of the Special Education Services Unit of the Department on May 9, 1991. That appeal was referred to the Division of Administrative Hearings (received on May 16, 1991) and assigned t [sic] this A.L.J.

After receiving the appeal letter, the A.L.J. contacted counsel by telephone. A schedule for initial submissions was agreed upon on May 20, 1991, and set out in letter form on May 21, 1991. On May 30, 1991, in accord with that schedule, the District submitted a statement of issues and a request to submit additional evidence. Appellees responded on June 7, 1991. Following a telephonic informal pre-hearing conference, the A.L.J. set an evidentiary hearing for June 26, 1991, to be limited as set out in a Scheduling Order issued on June 18, 1991. That order also set out a briefing schedule and time for anticipated issuance of decision, reflecting the acquiescence of counsel concerning the time of decision issuance. After a further telephonic prehearing conference on June 25, 1991, the evidentiary hearing was vacated and a stipulation entered concerning consideration of additional evidence submitted by affidavit concerning certain costs. The accuracy of the statement relating to the costs was essentially undisputed, although the necessity for the program to which they relate remain [sic] a central issue. The A.L.J. informed counsel telephonically of the outcome of this appeal on August 23, 1991, the time set for decision in the Scheduling Order.

STANDARD OF REVIEW

This review is part of a proceeding brought under Colorado and federal statutes and regulations providing generally for the education of handicapped children at public expense. CDE is the Colorado SEA designated for the administration of federal funds under the Act. The federal statute and regulations are phrased generally in terms of requirements with which state plans must comply in order to qualify for funding. Thus [sic] although specifically pursuant to the State Plan, this review is primarily governed by federal law. 20 U.S.C. § 1415(c) and 34 C.F.R. § 300.510 charge the officer conducting a state level review for the SEA with responsibility to examining [sic] entire record, insure consistency of the proceedings with due process, seek additional evidence if necessary, afford the parties an opportunity for argument, and make an independent decision on completion of review. The standard thus permits notation or observation of additional facts. It does not, however, alter the well-established principle that the findings of the trier of fact, who heard the evidence and observed the witnesses, are to be upheld unless clearly contrary to the evidence. The I.H.O. was in a unique position to determine the credibility of witnesses and the weight to be given to the evidence, including expert testimony. The record here generally supports the I.H.O.'s evidentiary findings, and the A.L.J. will not disturb them. The A.L.J. has made additional findings on some issues on which supplemental material was submitted[3] and has noted some additional matters, either clear from the evidence or undisputed, upon which the I.H.O. made no specific findings.

The District in its statement of issues and briefs characterized some findings as contrary to the evidence. With few

exceptions, these challenges relate primarily to ultimate findings, including characterization of evidentiary findings relating primarily to the appropriateness of the education received by and available to the Child and the extent or sufficiency of his educational progress. With the exception of one finding which has limited relevance and is contrary to the evidence[4] the challenged findings relate to mixed questions of fact and law or are questions [sic] legal interpretation, which are more accurately regarded as conclusions of law. Characterizations and ultimate findings involving interpretations of the Act, and of case law interpreting it, are not entitled to the same deference afforded to the evidentiary findings. While the A.L.J. will not substitute *evidentiary* judgment or evaluation of the weight of the evidence for that of the I.H.O., his duties as reviewing officer under the Act require closer scrutiny of the characterizations of the evidence and application of the law to the evidentiary facts. The A.L.J. has afforded deference to the I.H.O.'s exercise of his fact-finding function, and no material error of evidentiary fact has affected the outcome of this review. The A.L.J. has, however, exercised the prerogative of the reviewer to disagree with some of the I.H.O.'s interpretations of the evidentiary facts, ultimate findings, and ultimate conclusions.

SUMMARY OF FACTS

The facts -- *i.e.*, circumstances, condition of the Child, sequence of events and similar matters other than interpretation or opinion -- were not in substantial dispute. Except to the extent that they set out opinion or describe contentions of parties, the A.L.J. adopts and incorporates the evidentiary findings set out on pages 2-9 of the I.H.O.'s decision as

"Findings of Fact [sic].[5] The A.L.J. here summarizes and sets out the facts found by the I.H.O., found by the A.L.J. [sic] either from subsequent submission or from the record and not in dispute, and concerning the proceedings before the I.H.O., necessary to an understanding of the issues and of this decision. Detail and emphasis varies from the I.H.O.'s finding [sic], but this summary is not intended to be a substitute for those findings. Where the summary is less extensive or exhaustive than the findings of the I.H.O., the I.H.O.'s findings are to be considered part of the facts of the case unless noted otherwise. The summary is organized by sections that must be considered as a whole for complete understanding.

I. GENERAL BACKGROUND AND CHRONOLOGY

The Child was born in September 1982 and was thus eight years of age at the time of the hearing and of this review. At the time of the hearing he was a second-grade student at Olathe School, which he has attended throughout his school career. Appellees live approximately five blocks from the school in Olathe, a town in Montrose County (and in the District) approximately ten miles north of Montrose. Montrose is the county seat and most populous city in the county, several times larger than Olathe.[6]

The Child has been receiving special education services, funded by IDEA and ECEA, continually since beginning kindergarten. He is scheduled to commence third grade at the beginning of the 1991-92 school year. The school he will then attend is the principal issue in this matter.

The Parents have been actively involved with T.M.'s education and development since before he began kindergarten.

Both have participated in all staffings and in the development of his I.E.P.s. The Mother frequently goes to school performing volunteer work. The Parents have a younger son who now also attends Olathe School.

District administrators and staff members have had increasing concern about both the physical accessibility and available program at Olathe School since before T.M. began attending school in the District. In August 1990 Donald Binder, Director of Student Services for the District, informed the Parents that the staff desired that the Child go to Northside when the school year began in the fall. Northside is located in Montrose, approximately ten miles from Appellees' home. The Parents objected and expressed a strong desire that the Child remain at Olathe School. Because of the objections, it was agreed that the Child would commence the school year at Olathe and the decision on location of services would be made at the triennial review staffing, then scheduled for early fall. That staffing was eventually held on November 27, 1990.[7] There was little apparent disagreement about the substantive contents of the I.E.P. as a statement of T.M.'s functioning level, needs, and the services necessary to meet them.[8] The committee could not agree upon the location of services. A majority, including administrators and all teachers involved with academic programs, voted to move the Child to Northside, [sic] a minority, including the Parents and physical and occupational therapy providers, voted to keep him at Olathe School.

On December 13, 1990, Binder wrote to the Parents stating an intent to transfer the Child to Northside effective January 7, 1991, when classes resumed after the Christmas vacation. He also discussed the Parents' right to a due

process hearing when there is disagreement regarding a change or requested change in programs and attached an explanation of procedural rights. On January 3, 1991, Claire Williamson, former senior attorney for the [sic] Legal Center, spoke with counsel for the Board by telephone. It was then agreed that an independent psychological evaluation of T.M. would be conducted at the District's expense, the move to Northside would be postponed until January 21, 1991, and the Parents and District staff would meet before that time. On January 7, 1991, Ms. Williamson requested a hearing in a letter to counsel for the Board. Counsel for the Board then contacted CDE in order to request a list of potential I.H.O.s to commence the hearing process. In subsequent conversations and correspondence, both parties agreed to modify the timeliness [sic] for scheduling the hearing in order to obtain the independent evaluation and convene a new staffing to reconsider the issues after receiving the evaluation report.

Dr. Sally Rogers, a psychologist who is director of the day treatment program at Colorado Psychiatric Hospital in Denver, met with and evaluated the Child on March 6 and 7, 1991. She issued a written report on March 12, 1991. The staffing team reconvened on March 18, 1991, one week before the date scheduled for commencement of the hearing. Dr. Rogers, counsel for both parties, a facilitator and private speech and occupation [sic] therapists were also present. Based on the report, the team made additions and changes to the content of the I.E.P. At the conclusions [sic] of the meeting, the staffing committee was again polled on the issue of location of services. All members persisted in the recommendations expressed at the November meeting, and one member who had not been present for the vote in

November added his vote for Northside. At the request of counsel for the Parents, the team recommended that the transfer be delayed until the beginning of the next school year in September 1991. The staffing team advised the Parents that the I.E.P. could not be fully implemented as written while the Child was at Olathe School. Since the new staffing had not resolved the disagreement, the hearing proceeded as scheduled.

The hearing took place on March 25 through 27, 1991. The I.H.O. heard 16 witnesses and was presented with 48 exhibits[9] as well as briefs[10] and oral arguments from counsel. No procedural errors were claimed and the I.H.O.'s impartiality was not questioned. The I.H.O. issued his decision on April 10, 1991. The I.H.O. concluded that the Child was receiving an appropriate education at Olathe School with the resources currently available there, and should remain at that school pursuant to the principle of L.R.E. The District appealed. Appellees have not cross-appealed and do not claim any error on the part of the I.H.O. The matter has become ready for decision in the manner set out in the Procedural History.

II. THE CHILD

A. Condition

The Child has CP, a deficit of motor power and coordination due to brain damage, which was diagnosed in infancy. He was diagnosed with hydrocephalus (excess fluid between the cranium and lining of the brain, causing thinning of the brain) at six months and it was shunted (treated by implantation of a device to divert the fluid). He has since had at least one operation adjusting or replacing the shunt, and has had periodic continued problems with the shunt. His condi-

tion causes spastic quadriplegia and severe mobility and coordination deficits, particularly on the left side. His vision is impaired by inability to focus his eyes together. He has generally been able to move only with the aid of assistive devices, human assistance or both. Through much of his school time he has used a three-wheeled device designed so he can work while sitting in it. During the 1990-91 school year, he also learned to use a walker, at least on a limited basis. The Parents hope that he will at some time become able to ambulate with no more assistance than a cane. He can climb stairs with difficulty and assistance, but cannot descend. He has also had difficulty writing, but has now learned to use his right hand while holding the paper with his left. His speech is frequently difficult to understand and he has been working with S/L therapists for several years.

The Child 's condition has affected his intellectual capacity in addition to creating physical limitations. Depending on the type of test and areas being tested, his IQ [sic] scores have generally ranged from the middle 50s to the middle 70s.[11] By the most recent of the two most widely used measures of which there was evidence, he had a verbal score of 66 $\pm$ 6[12] on the WISC-R and averaged 62.3 $\pm$ 5.7 for three components of the S-BIS with a high 76 $\pm$ 4.5 on verbal reasoning and a low of 54 $\pm$ 7 on quantitative reasoning.[13] Both scores would place him in the mentally deficient range by standard classification.[14] The parties are also in agreement, however, that classification of intelligence level is substantially less important than the accurate identification of needs and the delivery of services to meet those needs. T.M.'s physical limitations have precluded "performance" type tests which involve physical manipulation of objects. As explained more fully in the next section, the

Child's performance and learning level has been consistently below grade level, with the gap between the two increasing.

The Child has had some behavioral problems, particularly striking other children to gain attention or while frustrated, but has never been classified as behaviorally disordered. His behavior is currently more generally acceptable than was previously the case. He has a short attention span and particular difficulty with short-term memory. Dr. Rogers suggested consultation for possible medication for attention deficit disorder, but the staffing committee determined in March that this was not required for developing the I.E.P.[15]

Although the emphasis in a matter such as this necessarily focuses upon the Child's disabilities and educational needs, the record also shows that he has some strengths. The reports generally show that T.M. is outgoing and determined. He has overcome much of his aggressive behavior toward other children, probably due at least in part to realizing that it produced negative reactions. Dr. Rogers describes him as using social conversation effectively and being able to establish rapport. He has developed friendships among his peers. Dr. Rogers also noted that the Child had some awareness of logic. He performed best in exercises which were not complex and did not require retaining material in short-term memory; complex or multi-step operations were particularly difficult.

B. School History and Performance

The Child attended preschool in Montrose during part of the day from the age of three until he was ready to enter kindergarten. He has also received OT, PT and S/L services from various agencies and providers since that time. The Child was tested in late 1987 and early 1988 for develop-

ment of an I.E.P. in anticipation of his entering kindergarten in the fall of 1988. The I.E.P. was developed and signed on April 18, 1988, with principal emphasis on physical and S/L needs. He was scheduled to commence at Olathe School that fall.

On July 28, 1988, Binder, who had recently begun work for the District, Gene Cave, Assistant Superintendent of the District, and Zoe Werden, the principal special education teacher at Northside, met with the Parents. They suggested that the Child attend Northside, rather than Olathe School. The primary reason for that suggestion was concern over barriers to physical accessibility of the premises at Olathe School, particularly ancillary facilities such as the library, which is on an upper floor. Programmatic concerns were also expressed, but were not the principal emphasis. The Parents declined the suggestion, and enrolled the Child at Olathe School. It is undisputed that he began school below the kindergarten level of academic development.[16] The Child fell further behind during the 1988-89 school year.

The Child's first-grade I.E.P. was prepared at an annual review staffing held on May 9, 1989. Statements of needs and prioritized goals were developed, most of which were continuations of those for kindergarten. The statements represented a mixture of academic, physical or related, and emotional/behavioral areas. Delivery of services was to be primarily in the regular classroom with five hours of Resource Room teaching, one to two hours of S/L instruction and 1 1/2 hours of OT per week.

During his first-grade year the Child fell further behind grade level, particularly in the areas of reading and math. A special staffing was held on January 30, 1990, because of concerns regarding the adequacy of the current placement

and I.E.P. The educational aspect of the assessment noted that the regular curriculum had been "adapted to the degree that he is not involved in any first-grade material" and that T.M. was working at the kindergarten or beginning first-grade level. The I.E.P. listed six needs and five specific goals, with increased emphasis on educational or academic matters. The handicapping condition was listed as "multiple." The Parents both signed the I.E.P. indicating that they agreed with the recommendations. The I.E.P. was designed to carry into T.M.'s second-grade year. The ending date was listed as October 25, 1990, to coincide with the anticipated time of triennial review.

The Child continued to fall further behind the grade level during the remainder of the 1989-90 school year. In the summer of 1990, he underwent an orthopedic operation and was unable to receive any summer instruction to avoid regression, though the I.E.P. had included ESY. Even without the regression, the concerns which prompted the service-location change proposal in August 1990 were more programmatic than physical.

By the time of the triennial review in the fall of 1990, the Child's educational level was described as end of kindergarten to beginning of first grade. His special education teachers indicated he had made little academic growth since kindergarten. Strengths were listed as identifying colors and the names of letters, with counting to 11, and recognition of numbers from zero through ten. Weaknesses were identified in all beginning first-grade skills. The Child's regular education teacher indicated that he "tuned out" most of what was going on the regular classroom when he was in it because the material was too far beyond his level. The levels and needs shown in the triennial review and related

assessments are discussed more fully in a subsequent section of this Summary of Facts.

By the time of the November 1990 trienniel [sic] review, the Child was receiving most of his basic academic instruction in the Resource Room[17] and was in the regular classroom only for non-academic subjects. His academic teachers all expressed the view that the program at Olathe was inadequate to meet the Child's needs and recommended that he go to Northside because the programs available there are more suitable to meet his needs. The I.E.P. provided for physical education, reading, math, language and writing, all totally individualized, in a special education context, and science, social studies, art and music in the regular classroom with "modifications or assists" to the second-grade curriculum. Teachers and administrators also expressed the view that if the Child were at Olathe, rather than Northside, he would need to be in the Resource Room more times because of the differences in the programs.

By the times [sic] of the March 1991 staffing and the hearing, the Child was receiving all of his academic instruction in the Resource Room, and was in regular classrooms for only approximately one hour per day, for non-academic instruction or activity. He was at that time functioning generally at the beginning first-grade level. By that time he had met three or four of the short-term objectives related to two academic goals[18] out of a total of 16 objectives related to five goals. Before the 1991 staffing he experienced a "growth spurt" in which some of his physical control and motor skills improved. He remained substantially below grade level in all academic areas.

III. DISTRICT FACILITIES AND SPECIAL EDUCATION SERVICES

A. Facilities and Services in General

The District encompasses the eastern, and most populous, portion of Montrose County, located in a high plateau area of the western slope of the Rocky Mountains.[19] Montrose and Olathe are the two principal municipalities. Olathe is ten miles north-northwest of Montrose via U.S. Highway 50. The District includes seven elementary schools,[20] three middle schools, and two high schools. Olathe has one elementary school, one middle school, and one high school, and the remaining schools are all either in or immediately near Montrose.[21] Schools vary in age and condition. In February 1991, Montrose County voters passed a capital refinancing plan including provision for substantial improvements in all of the schools.

Special education services offered by the District, to the extent materials [sic] here, include delivery of some basic services at all schools and "clustering" of more intensive services by providing the particular services to all students in need at one school. The clustering includes location of the elementary S/P needs program at Northside. M/M services are offered at all schools. Most ancillary services (*e.g.* [sic] PT, OT, S/L, and psychological) are delivered by "itinerant" professionals who provide services as needed to students at different schools at different times.

B. Olathe School

1. Physical Characteristics

The principal building of Olathe School is a four-story (three floors plus basement) structure of indeterminate but

substantial age.[22] It has no elevators and is not handicapped-accessible. The school complex also includes separate buildings for primary grades and music. Ramps have been built to the primary building toward the door of the music building. There is a covered walk between the primary and main buildings. The main entrance is located between the gymnasium and the academic-use portion of the main building, and is at a different level from both the basement and the first floor, requiring the use of stairs to reach both. The primary building contains classrooms housing kindergarten and the first two grades. The Resource Rooms in the main building are located on the first floor. The library in the main building is located on the second floor. The room where the Child had received resource services is in a converted shower or boiler room in the basement of the main building. Third and higher grades at Olathe School are located on floors above the first.

2. Special Education Services

Olathe School has M/M services available through Resource Teachers and ancillary services provided by para-professionals and itinerant specialists. Academic Resource services are at the M/M level, and provided by teachers trained in special education. Students from regular classes receive special instruction or assistance at the times subjects in which they are having difficulty are taught. Olathe School has two Resource Teachers, Susan Snyder and Maxine Keller, who have provided services to T.M. Resource services are generally designed to supplement the regular curriculum and adapt portions of it to the level and needs of the particular student. Each Resource Teacher has 20 or 30 students. Providing small group or one-to-one instruction

would leave little or no time to make additional preparation or visit classrooms. In addition to Resource Room services, other students can also provide "hands-on" assistance to special education students within the regular classroom.

C. Northside

It was undisputed that the Northside building is handicapped-accessible in all material respects. It is of relatively recent construction. There was no more specific evidence concerning the physical facility. The school is located in Montrose, approximately ten miles from Appellees' home.

Northside is one of 14 schools (including six elementary) in Colorado which has been designated for implementation of CEEM. CEEM is described as a collaborative effort coordinated by CDE and the federal Office of Special Education Services for services to change the system of delivering services to students with S/P needs. Objectives and methods include an emphasis on placing students' time and programs in regular classes to the greatest extent possible so that they can receive assistance from peers, and training regular education teachers and paraprofessionals to assist in serving the needs of S/P students. Northside is the designated location for service delivery to S/P need elementary students for the District, and is staffed accordingly. Ms. Werden is the S/P teacher, with paraprofessional support. She normally "doubles," *i.e.*, works with a paraprofessional, regular education teacher or therapist, to work with each student individually. At the time of the hearing, she was providing services to ten children, ranging in ages from 7 to 12, with a variety of both physical and mental handicaps. Service delivery is geared to the individual needs of each student as expressed in the I.E.P. The pro-

gram is designed in anticipation of each student needing more intense services than are available at the M/M level. Because of the staffing ratio and extensive use of paraprofessionals more time is available and devoted to each individual student. The program, using the CEEM approach, permits more time in the regular classroom with peer and paraprofessional assistance than is possible with the M/M level Resource Room program available at Olathe School.

D. Professional Training and Cost Consideration

Requirements for S/P special education teachers include specialized training beyond the Master's degree. No teacher with such training is currently available at Olathe. The cost of employing such a teacher, according to Binder, is $30,388, and could rise to $31,907 by the 1991-92 school year.[23] Additional training would also be required for a paraprofessional, at a cost of approximately $1,500. Salary for a paraprofessional for one year was estimated at $11,290.84, subject to possible increase to $11,855.38.[24] Accessibility problems at Olathe School would probably also increase the need for individual paraprofessional services to provide physical assistance.

Of the special education staff at Olathe, one holds a Master's degree and one does not. Both are older and have more experience than Ms. Werden, and both also have training for their level. They do not, however, have S/P level specialized training such as Ms. Werden has. Neither of the Olathe School special education teachers would presently be able to provide the extent or level of services which Ms. Werden can provide.

IV. THE CHILD'S I.E.P.s

A. Prior to the Triennial Review

The Child's I.E.P.s for 1988-89 through the fall of 1990 have been generally described in connection with his educational progress. All of the plans identified needs, goals and objectives and described both physical and mental deficits to be addressed. Each plan included a combination of academic, OT, PT, and S/L services and addressed the Child's physical movement within the classroom and provisions for writing, observation and the like as well as his academic needs. The following more detailed descriptions of the plans arising from the fall 1990 triennial review and Dr. Rogers' evaluation provide a reasonable sense of the provisions of the prior I.E.P.s.

B. Triennial I.E.P.

In the triennial I.E.P. the Child's current level of functioning was described by a series of short phrases in five specific areas, namely health/physical/motor, intellectual/cognitive, communicative, social/emotional/behavioral, and educational/academic. Most, but not all, of the phrases described problem areas rather than strengths. Most of the positive statements were in the social/emotional/behavioral area, noting that T.M.'s behavior had improved and he had been accepted by his peers although he still had the tendency to touch or hit to gain attention. In the intellectual/cognitive area, verbal reasoning was described as between borderline and mentally deficient with difficulties in attention, concentration and retention, and a strong short-term visual memory. In communication, T.M. was described as having made one year's growth in 18 months and to be functioning at a 4-4½

year old's language level; expressive language was the most frustrating area while vocabulary was the strength. Academically his skill level was described as at the end of kindergarten to beginning of first grade, with little academic growth in kindergarten. The notations also included not appearing interested, tuning out, inability to follow peer leads or group cues, poor depth perception in reading (affected by visual-motor delays), and having spurts and plateaus. Twenty-six specific needs -- 15 external and 11 internal -- were identified. The primary handicapping condition was described as multiple, specifically SLIC and PH.

The I.E.P. identified nine specific goals, with varying numbers of short-term objectives. Five of the goals were academic -- improving reading and math skills, sorting and counting money, improving math skills concerning addition, subtraction and enumeration, increasing motor skills through writing, and improving language skills. The time and money goal had two specific short-term objectives, and all of the other academic goals three to five. Two goals were emotional/behavioral -- improving attention and improving behavior relating to attention-getting -- each with specific objectives. The other two goals were physical -- improving strength and range of motion and improving speech intelligibility. The I.E.P. set out ten general accommodations and times for regular education, special education and related services, and noted eligibility for ESY. The plan included show-and-tell, week-end review (each for 15 minutes once per week) and opening for 30 minutes every day of regular education without assistance or modification; recess, lunch, art, music, science, social studies and special events by regular education with modification or assists to the curriculum, with 30 minutes per week each for art and music; reading, math,

language and writing all totally individualized with a Resource Teacher, physical education with consultation with an OT provider slightly more than an hour per week, and "mobility training and visual perception skills -- OT and PT" in the special education area; related services of speech therapy and OT/PT; and eligibility for ESY.

The I.E.P next noted consideration of alternatives, listing benefits of Olathe School and Northside, and described a polling of the staffing team including brief statements of the reasons for each member's vote. Ann Berns (psychologist), both special education teachers, Janice Hartmangruber (Olathe School principal), Ruth Bains (regular education teacher) and Binder all voted for Northside. Mary Dooley (the OT provider), Judy Kennedy (the PT provider), Jamie Neubert (speech therapist), and the Parents all voted for Olathe School. The plan concluded with the following statement immediately above the signatures:

> "Goals as written could not be met at Olathe. In the event that he remains at Olathe the staffing team will need to review and revise the I.E.P."

All members of the staffing team except the Parents (for whom no signature line was included) signed the document, which was not on the District's standard form. It is undisputed that all of the members of the team, including the Parents, agreed upon the needs, goals and objectives, and characteristics of service contained in the I. E .P.

C. The March 1991 I.E.P.

The reconvening of the staffing team in March 1991 led to a written addendum to the I.E.P. of November 27, 1990.

The addendum was phrased in terms of additions or amendments to the November I.E.P. On current level of functioning, the addendum included a specific listing of some test scores in the intellectual/cognition area, with a notation of strength in the verbal figural analysis, and language areas (relative to his own performance), difficulty with short-term visual memory, difficulty with executive functions and change in some language. In the communication area, the scores from another test were listed and some language was modified. In the social/emotional area, internal motivation was noted as positive, need to experience success was noted, fluctuation in behavior was attributed to environments and physical abilities and as having improved, and "in therapy" was added to "sometimes hitting or kicking." In the educational/academic area "specific deficits in math and memory," mastering some preacademic skills since kindergarten, concerns about attentional problems, academic growth since September, and difficulty in following peer leads and cues in class were added and "tunes out" was deleted from the notations. The staffing team reconfirmed that the assessment was sufficient in scope and intensity to identify the Child's level of functioning. The primary handicapping condition was changed to MH, without specific notation of the types of handicap. Five additional needs were added, one external and four internal.

Fourteen short-term objectives (ten of them related to speech articulation) and two new goals-[sic] improving math concept skills in ordinarity [sic], equivalence and seriation, and participation in group activities -- were added. All items except for class opening were deleted from regular education without assistance or modification. The language on regular education with modification or assistance was modified but

not substantively changed. The language on special education was modified but not substantively changed except for adding a notation that reading, math, language and writing would require 120 to 180 minutes per day pull-out time at Olathe School and 60 to 120 minutes at Northside. Psychologist/social worker ("as needed") and transportation to Northside were added as related services.

Additions were made to consideration of alternatives. The document reflected that all members of the team persisted in their original votes on repolling [sic]. Gary Whitlock (school social worker), who was not present at the time of the poll of the original staffing committee stated that he would have voted for Northside and would still vote for Northside.

V. PROCEEDINGS BEFORE THE I.H.O.

A. Preliminary Proceedings and Hearing

Neither party claims procedural errors. For that reason, and because both parties have presented their legal arguments thoroughly before the A.L.J., the lack of inclusion in the record of preliminary documents and briefs before the I.H.O. is immaterial. Prior to the hearing Appellees requested a prehearing order allowing the Child to receive additional educational services at Olathe School based on a 1990 statute (C.R.S. § 22-36-101) allowing enrollment in schools of choice within the School District of residence, unless in violation of a desegregation plan. The I.H.O. denied the request in an order (titled "Prehearing Findings of Fact and Decision") dated March 11, 1991. The I.H.O. reasoned that rational construction was necessary and the statute in question intrinsically required that the program be appropriate for the pupil seeking enrollment, in order to avoid absurd

results. Since there was at that time insufficient evidence to determine appropriateness of the program at Olathe School, the I.H.O. denied the motion. He noted that if the District had an available appropriate program but refused to provide it solely on the basis of T.M.'s handicaps, the relief could be entered.

The I.H.O. did not specifically rule on the question of which party had the burden of proof. The District presented its case first and presented its arguments first and last, in the position of the party with the burden. The issue was addressed in closing arguments, but not in the decision. The A.L.J. addresses the issue only briefly in the Conclusions of Law, because there is essentially no factual dispute and the issues are legal and interpretative, so its determination is not material to the outcome.

Although there was little or no factual dispute at the hearing, there was considerable opinion testimony from both school personnel and outside experts. Neither side objected to any exhibits. No error is claimed in any rulings during the hearing or in the I.H.O.'s conduct of the hearing. On one day the I.H.O. and the other participants met at and toured Olathe School before returning to the hearing location. The I.H.O. briefly mentioned the trip on the record, but did not include a detailed description. District exhibits included floor plans, photographs and a map of the grounds of Olathe School as well as a description of the improvement plans and an estimate which Binder obtained of the costs and the work involved in making Olathe School handicapped-accessible.[25] Appellees stated in their preliminary documents, and the Mother testified at the hearing, that the Parents are willing to accept the lack of handicapped-accessibility of Olathe School, do not request that the District

undergo the expense of that accommodation, and desire that the Child attend that school notwithstanding the physical barriers.[26]

B. Decision

The I.H.O. issued his decision on April 10, 1991. His Findings of Fact began by broadly describing the Child's condition, setting out needs as stated in the triennial and supplemental I.E.P.s, and briefly outlining his educational history. The findings briefly described the contentions of each party and the reasons for those contentions, the financial limitations of the District, and the limits of the building. The I.H.O. found the Child's teachers at Olathe School "master teachers" because of length of service, preparation and dedication. He stated there was no evidence regarding the difference in cost of providing services to two facilities. He also included as a finding that educating special needs children in neighborhood schools to the greatest extent possible is "the best practice in special education according to current wisdom in the field." Since that finding facially relates to a matter of theory and opinion, the A.L.J. rejects it as a finding of fact, and notes that the "best practice" in the field is a matter of opinion.

The I.H.O. described the case as one involving mainstreaming or L.R.E. and set out as the appropriate standards whether the services that make Northside superior could be provided at Olathe School or whether education at Olathe School could be achieved satisfactorily for T.M. and, if not, what was the next L.R.E. He analyzed the questions in the terms of four specific issues: architectural barriers, time in regular classroom and rate of progress, similarity of programs, and social concerns. Regarding architectural barriers he noted that the Appellees were "willing to put up" with the

barriers, and that there was no evidence of additional costs to the District caused by them. Regarding regular classroom time and rate of progress, he noted that there was expert opinion that the Child would spend more time in the regular classroom at Northside; stated that progress was not "as rapid" as hoped, citing summer regression, rate of maturation, the Child's surgery, and lack of program of Olathe School as the reasons, and then stated that despite the slow rate "it is evident that [the Child] is making educational progress at Olathe." Regarding similarity in programs, he stated that in the absence of evidence of a differential he would assume that the cost of the programs at the two schools was the same and noted that related services would be the same at both. Concerning social concerns, he concluded that Olathe School was clearly superior because the Child has a brother and friends there, his family is involved in it, it was more convenient, there was no "stigma of going to a special school" and the school was in the neighborhood. Based on those conclusions, the I.H.O. entered the following decision:

> Because the law does not require the best possible education, it is the decision of the I.H.O. that (T.M.) is receiving an appropriate education at Olathe Elementary School with the resources currently available there and pursuant to the principle of the least restrictive environment he should remain at Olathe Elementary School where he can participate in 'a regular educational environment' until such time as his needs dictate another placement.

DISCUSSION AND CONCLUSIONS OF LAW

I. IDENTIFICATION OF ISSUES

The sole ultimate issue is the location at which the Child is to receive educational services to be provided by the District. In its identification of issues, the District set out five specific alleged errors by the I.H.O., each with component subparts. These issues, paraphrased are:

(1) Whether the Child is receiving an appropriate education at Olathe School, including subissues of the appropriate standard for determining that question, the standard for determining educational benefit, and treatment of social concerns as an overriding factor in view of the Child's I.E.P.;

(2) Whether Olathe School is the L.R.E., including subissues of the appropriate standards, characterization of Northside as a "special school" in the analysis, legal standards relating to costs, and the emphasis on "current wisdom";

(3) The importance of architectural barriers in determining the placement, including subissues of whether the Parents' lack of complaint eliminates accessibility as an issue and the correctness of the finding of no burden on the District in educating the Child at Olathe School;

(4) Whether the I.H.O. exceeded his authority in directing that the Child's education be continued at Olathe School, including subissues of whether the I.E.P. can reasonably be implemented at that school, whether the District must implement changes at Olathe School to allow the Child access to the program when another

appropriate program exists, and whether the order infringes the right of the District's Board of Education to allocate resource [sic]; and

(5) Sufficiency of factual findings to support the I.H.O.'s conclusions.

In response to the District's statement of issues, the Appellees described the issues as: (1) whether the I.H.O. was correct in determining that the Child could receive an appropriate education at Olathe School and, as a subissue, whether the determination that Olathe School was the L.R.E. is correct, and (2) the question of the burden of proof. That description practically added only the burden of proof as an issue.

The A.L.J. will not redefine these issues, although their analysis is presented in a different pattern than set out in the District's statement. Significantly, the need for an appropriate program is uncontested, *i.e.*, the Parents do not contend that the District would be required to place T.M. at Olathe School even if that placement was not appropriate. The District contends that it cannot meet its legal obligation to provide F.A.P.E. to the Child at Olathe School and that therefore he must be educated at Northside, as the least restrictive appropriate program. Appellees contend, as the I.H.O. concluded, that Olathe School is appropriate and the District must educate him there even though that program would not provide him with the best possible education.

II. GENERAL LEGAL FRAMEWORK

The A.L.J. has discussed the general provisions of the IDEA, State Plan, related regulations and case law in numerous prior decisions, most recent of which is *S.M.B. v.*

Arapahoe County School District No. 6/Littleton Public Schools, Case No. ED 90-13.[27] *See also C.B. v. Cherry Creek School District No. 5*, Case No. ED 90-05; *C.S. v. Boulder Valley School District No. RE-2*, Case No. ED 89-05 (1990); *K.H. v. Littleton Public Schools*, Case No. ED 86-11 (1987). Due to the demonstrated familiarity of counsel with the applicable legal principles, this discussion is brief.

In general terms, the purpose of the IDEA is to assure that all handicapped children have available to them F.A.P.E., including special education and related services to meet their unique needs. 20 U.S.C. § 1400(c); 34 C.F.R. § 300.1(a). 20 U.S.C. § 1401(a)(18) defines F.A.P.E. as special education and related services (a) provided at public expense and under public direction without charge, (b) meeting the standards of the SEA, (c) including appropriate education at the correct level, and (d) conforming to an I.E.P. as required under the Act.

In *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) ("*Rowley*"), the United States Supreme Court interpreted the requirements for F.A.P.E. and discussed the procedural provisions of the Act and their implications. In *Rowley*, still regarded as the leading case in the field, the court generally defined F.A.P.E. as personalized instruction with sufficient support services to permit a child to benefit educationally from the instruction. The Court rejected arguments and lower court holdings that the Act required programs to maximize each handicapped child's potential. The Court construed the Act to require that handicapped children be given a "basic floor of opportunity" commensurate with the requirement of equal protection in *U.S. Const. Amend. 14.* 458 U.S. at 200. The Court

emphasized the importance of procedural rights as on an equal footing with the measurement of an I.E.P. against a substantive standard. It noted that the legislative scheme suggested that Congress believed that compliance with procedures, including full parental participation, would usually result in a substantively satisfactory I.E.P. 458 U.S. at 206.

The Act and regulations also require that each child be educated in the L.R.E. and that, to the maximum extent possible, handicapped children be educated with non-handicapped peers. 20 U.S.C. § 1412(5)(b) requires that:

> To the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from [sic] regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.551 requires educational agencies to maintain a continuum of alternative placement [sic] ranging from instruction in regular classes with appropriate aids all the way up to institutionalization. 34 C.F.R. § 300.552 requires in pertinent part that:

> (a) Each handicapped child's education [sic] placement:
> (1) is determined at least annually,
> (2) is based upon his or her individualized education program, and

(3) is as close as possible to the child's home; . . .

(c) Unless a handicapped child's individual [sic] educational [sic] program requires some other arrangement [sic], the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effects [sic] on the child or on the quality of services which he or she needs.

See also State Plan, Part II, Section X.A.5, X.B.8.

III. ANALYSIS

A. Context and Organization of Discussion

The central issue is whether Olathe School is an appropriate placement for T.M., both in the context of the services he has received to date and the potential for the 1991-92 school year and beyond. "Appropriateness" must be considered in light of the F.A.P.E requirement of the Act; therefore, the essential question is whether the Child has received or can receive F.A.P.E. at Olathe School. The question of potential for the future involves consideration both of whether the current facility and programs are sufficient to meet the Child's needs and, if not, whether and to what extent the District can be required to modify either or both in order to educate T.M. at Olathe School. Clearly if the child has been receiving F.A.P.E. at Olathe School and can receive it in 1991-92 without significant modifications, no further inquiry is necessary. If the Child has not been receiving F.A.P.E. or cannot receive F.A.P.E. at Olathe

School in 1991-92 without modifications beyond what the District can be required to make, the placement at Northside becomes the L.R.E. and therefore appropriate. The A.L.J. first considers the appropriateness of the education which the Child has received at Olathe School followed by a potential for F.A.P.E. at Olathe School in the future without major modification. Further discussion follows from the results of those analyses.

B. Appropriateness of Education at Olathe School

1. Criteria for Evaluation

Rowley sets out the basic standard for determining whether an education, or proposed education plan, is appropriate. The test is fundamental, and its application necessary, in any case in which the appropriateness of education already given or offered is an issue. The A.L.J. rejects the I.H.O.'s statement that the test is "not helpful" in an I.R.E. case; the question of L.R.E. may only be considered as between appropriate alternatives. A placement which is not appropriate or does not afford F.A.P.E. may not be approved even if it is considered less restrictive than other appropriate placements. A placement which meets the *Rowley* test may be approved as the L.R.E. even if it does not offer the best possible education among alternatives proposed. In either event, the *Rowley* test is a prerequisite to considering alternatives in terms of which is the least restrictive.

The essential test set out in *Rowley* is whether the child is able to benefit educationally from the program. The Court recognized that genuine, and not mere token, benefit from special education is necessary to constitute F.A.P.E. The student in *Rowley* was of above average intelligence but deaf, and the Court reversed a lower court holding requiring

the LEA to provide a full-time sign language interpreter to maximize the child's potential. In such a context the I.E.P. and personalized instruction "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade". 458 U.S. at 204.

In cases involving children who are not at grade level or able to advance from grade to grade in a regular classroom, the measure of benefit is less clear-cut. A U.S. circuit of appeals [sic] in *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), held that the benefit must be meaningful and not trivial. The court quoted language from *Rowley* recognizing that Congress did not intend to spend public money for programs which would not provide real benefits. 853 F.2d and 181-82. The same court had previously held in *Board of Education v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986) that a plan must be one under which educational progress is likely. The A.L.J. noted the need for meaningful benefit in *S.M.B., supra, C.B., supra*, and *C.S., supra.*

Characterization of benefits as meaningful or trivial, of course, is itself a matter of interpretation. The A.L.J. cannot simply accept the I.H.O.'s characterization of educational progress or benefit, or appropriateness, as findings of fact to be upheld without further question if supported by evidence. The principal criterion for measuring meaningful benefit in a case such as this must be significant progress toward some reasonable and realistic goal considered in the light of the extent and nature of the child's handicapping condition. In the absence of any clearly understood and agreed long-term goal (which could be difficult to identify at this time in view of T.M.'s age)[28] the most appropriate test is one of reasonable progress toward

meeting the needs, and reaching the goals, set out in the Child's I.E.P.s. The District's professional staff and Parents have consistently agreed upon needs, goals and services in establishing I.E.P.s for the child. There was no hint in the evidence that any staffing participants have considered the goals unrealistically high or low, or that any goals have been rejected on that basis. As the A.L.J. discussed in *S.M.B., supra, Rowley* refers to programs designed and calculated to provide benefit but does not suggest the accomplishment of the benefit sought as a test. Success and review of benefits and progress are valuable factors for consideration, however, particularly in developing future I.E.P.s. The District must make a good-faith effort to find and use an approach which will work, and seek to change an approach which does not work. In the context of considering services available and delivered, the standard of F.A.P.E., requires that an LEA at least present and offer services capable of making meaningful progress toward meeting realistic goals. The F.A.P.E. requirement is not met by services not capable of meeting such goals, or by a placement in which capable services are not available.

2. Progress Up to Time of Hearing

The I.H.O. concluded that despite its slow rate, the Child was making educational progress at Olathe School. That is a legal interpretive opinion, not an evidentiary finding binding on the A.L.J. The undisputed evidence showed that the Child had met a few short-term objectives set out in his I.E.P. -- recognition of 30 sight words, recognition of numbers and some letters, and ability to count to 10 or 11. The I.E.P. contains an extensive list of academic goals. The professionals who provide the service do not regard the

progress the Child has made as meaningful. Those professionals are unanimous in the opinion that they, themselves, cannot provide appropriate educational services to T.M. at Olathe School. The Child has made progress in few areas in contrast to goals which are admittedly realistic. Comparative numbers or percentages of objectives met are not determinative because such objectives can and do vary in their difficulty, the reasonable time needed to achieve them, and other factors. The most important considerations are the progress in view of the particular goals and objectives involved, the level at which the Child is operating, the level which might realistically be achieved, and the assessments of those most directly involved with his education. At least to some extent, the progress T.M. has achieved represented no more than a return to the level which he had reached at the end of first grade, in the spring of 1990. Without regard to the level of other students[29] and even considering summer regression because of the operation, T.M.'s progress was far below the level which those charged with teaching him consider him able to achieve. T.M. did not make, and in view of the available programs [sic] has not had a clear opportunity to make, [sic] meaningful progress at Olathe School. The view of those directly involved in teaching T.M. is of key importance. Their recommendation of a change implicitly recognizes that the services they can provide are inadequate. T.M.'s degree of educational progress at Olathe School was minimal at best, and not meaningful. It did not represent F.A.P.E. within the meaning of the IDEA. Therefore, the A.L.J. must reject and reverse the I.H.O.'s holdings that the Child was making educational progress at Olathe School and, by implication, that the program provided there up to and including the time

of the hearing was appropriate.

3. Current I.E.P. and Ability to Provide Appropriate Education

The conclusion that the Child has not received F.A.P.E. at Olathe School, and that the staff there is not able to provide it for him, makes clear that Olathe School cannot meet the current plan. The revisions adopted in March 1991 included the explicit statement that the goals and needs stated in the I.E.P. could not be met at Olathe School. The program available there, despite the dedicated efforts of the staff, has not produced meaningful progress toward meeting the goals of the Child's I.E.P.; nothing in the record suggests a likely change in that history. The consideration relates wholly to academic goals because the related services provided the Child are the same at either school. Simply put, the I.E.P. cannot realistically be met at Olathe School. Both Parents and staff agreed on the needs and goals expressed in the I.E.P., and its appropriateness is not questioned.[30] Nothing in the record suggests that an I.E.P. sufficiently less ambitious that [sic] the program available at Olathe [sic] School could meet it [sic] would be appropriate. The professional staff has clearly expressed the opinions that T.M. is capable of more than Olathe School can provide for him, and that what that school can provide does not rise to the level of F.A.P.E. Therefore, the A.L.J. concludes that the program and facilities currently available at Olathe School are not capable of meeting the needs and goals set out in the Child's I.E.P. and are not capable of providing him with F.A.P.E. as required by the IDEA.

4. Potential Modifications

The A.L.J.'s conclusion that the Child has not received, and cannot receive, F.A.P.E. at Olathe School is based solely upon the inability of the current staff and program at Olathe School to meet T.M.'s educational needs. Physical accessibility would become a significant issue only if Olathe School was, or could reasonably be made, programmatically appropriate. The A L.J. agrees with the I.H.O.'s conclusion that the architectural barriers, by themselves, do not render Olathe School inappropriate.[31] Therefore, the only issues with respect to modification are the extent of modification which may be necessary to make Olathe School appropriate and whether the District can be required to make such modifications.

Evidence of the difference in programs between the two schools was extensive. The primary difference is in the respective intensity of services, and consequent intensity of personnel, of the S/P program at Northside and the M/M program available at Olathe School. Ms. Werden emphasized that the primary consideration is the needs of the Child as expressed in the I.E.P., and not the label which is placed on the program. T.M. needs a great deal of individual attention and work. The staff at Olathe School is inadequate and insufficiently trained to meet that need. Binder's affidavit, accepted as an accurate statement of the cost of providing an S/P needs program at Olathe School, states that such an addition would cost $40,000 to $45,000 in recurrent personnel costs and approximately another $5,000 in training and equipment.[32] Essentially, the addition would be made solely for T.M.'s benefit.[33] Identifying the changes needed, and their cost, leaves the issue of whether or not the District can be required to incur the expense or regard [sic]

to educate T.M. at Olathe School, when an appropriate program is already available at Northside.

Nothing in the IDEA or federal regulations, or the State Act, regulations or Plan, requires that LEAs offer all services in all schools. The State Plan, at Section X.A, sets out general policies on L.R.E. These include requirements for availability of a continuum of placement [sic] with an array of services. It contemplates education elsewhere than at the school the Student would attend if not handicapped *if the I.E.P. requires another arrangement*. Practical considerations, including costs, are clearly important. The number of students, student-teacher ratio, intensity and degree of use of a program are key factors in determining whether it is appropriate to cluster the program. The elementary S/P program at Northside serves ten students, most of whom would otherwise attend other schools. The clustering of that program is clearly reasonable and the District cannot be required to incur the expense necessary to provide it at Olathe School. Therefore, the A.L.J. concludes that T.M. cannot receive F.A.P.E. at Olathe School either under current conditions or with any modifications which can reasonably be required of the District.

C. The Northside Placement

It is undisputed that Northside is an appropriate placement for T.M. The educational program is adequate to meet his needs and was unanimously recommended by the professional staff. The staff also expressed a view that, because of the program at Northside, the Child would spend substantially more time in a regular classroom and have less "pull-out" time at Northside than would be possible at Olathe School. Northside is, under the circumstances, the L.R.E. It is the

closest school to Appellees' home which has an appropriate program. In terms of offering education with non-handicapped peers Northside is less restrictive than Olathe School because of the probable greater amount of time that T.M. will be able to spend in a regular classroom. The social concerns which Appellees and the I.H.O. emphasized were not reflected in the most significant goals in the Child's I.E.P. Social development was recognized as a strength for T.M., after he had overcome his tendency to hit other children. That strength could serve him well in the new environment, while he is being better served in the areas in which he most needs help. The other concerns expressed by the Parents, while real, do not overcome the fact that T.M. cannot receive an appropriate education at Olathe School. The District cannot be required to incur the added expense of educating T.M. appropriately at Olathe School when an appropriate program is in place and available at Northside.

IV. THE BURDEN OF PROOF

The I.H.O. did not specifically rule on the burden of proof issue, although the order of presentation was that which would apply if the District had the burden. Each party argued that the other appropriately had the burden of proof. The issue may be important in future cases, and in the A.L.J.'s view it is clear. Therefore, brief discussion is appropriate even though the issue did not affect the outcome. The A.L.J. has discussed the issue before.

Although this proceeding is generally governed by federal law, it is specifically a review pursuant to the State Plan. Both counsel recognized in the argument before the I.H.O., that the APA applies when there is no contrary provision in the State Plan, or in state or federal regulations. C.R.S. §

24-4-105(7) places the burden of proof upon the proponent of an order. As the A.L.J. has repeatedly and consistently held, a party which seeks to change the status quo, or which takes an action reviewable by APA hearing changing the *status quo*, is the proponent of the order and therefore bears the burden of proof. Most administrative proceedings involve an agency and a private party. A private party seeking a change, such as the granting of an application for a new license which has been denied, is the proponent of the order and bears the burden of proof. An agency seeking the change, such as disciplinary action against a licensee, or taking an appealable action changing the *status quo*, such as an immediately-effective disciplinary action against an employee, is the proponent of the order and bears the burden. In an IDEA proceeding, parents seeking positive relief, such as a change in an existing program or reimbursement for private school placement, bear the burden. An LEA which makes or proposes a change in program which the parents appeal bears the burden. T.M. had been placed at Olathe School, and was receiving his education there. The District proposed the change in location and the Parents appealed. Therefore, the District was taking an appealable action which changed the *status quo* and the burden of proof was on the District.[34] Thus the order of presentation and of argument before the I.H.O. was consistent with the correct allocation of the burden of proof. Since the District met its burden, the allocation of burden was not crucial to the outcome of this matter:

DECISION

For the reasons stated in the body of this decision, the holdings and conclusion of the I.H.O. that the Child is

receiving an appropriate education at Olathe Elementary School and, by implication, that he could continue to receive such appropriate education at that school, and that therefore according to the principle of the least restrictive environment he should remain at that school, is reversed. The A.L.J. concludes that Olathe School is not an appropriate placement; that the District cannot be required to incur expenses to the extent necessary to make it appropriate; that Northside Elementary School in Montrose is therefore the least restrictive placement at which the Child can receive a free appropriate public education as required by the Individuals with Disabilities Education Act; and that the action of Montrose County School District RE-1J in directing that the Child's placement be changed from Olathe Elementary School to Northside Elementary School was necessary to meet the District's obligation to provide T.M. a free appropriate public education, and consistent with the principle of least restrictive environment. That action therefore must be and hereby is upheld and it is directed that T.M. be placed in the Severe/Profound program at Northside Elementary School, in accordance with his Individual [sic] Education Plan as last modified on March 18, 1991, commencing with the beginning of the 1991 fall school term on or about September 3, 1991.

DONE AND SIGNED this ninth day of September 1991

nunc pro tunc August 23, 1991

/s/ Don P. Stimmel
DON P. STIMMEL
Administrative Law Judge

FOOTNOTES

1. Designated in earlier pleadings as "Petitioner", and Respondent below; designation changed to describe position more accurately and recognize nature of this case as an appeal.

2. Designated "Respondent" in earlier pleadings, and Petitioner below. Changed for the reasons stated in Footnote 1 with respect to Appellant.

3. The A.L.J. considered an affidavit and supplemental affidavit issued by Donald D. Binder, Director of Student Services for the District. The first affidavit discussed the costs of providing at Olathe School the program available for the Child at Northside Elementary School.

4. Specifically, Finding of Fact No. 16 on page 7 which refers to "the best practice in special education according to current wisdom in the field". That finding is an expression of opinion or theory and not a finding of evidentiary fact.

5. The exceptions are paragraphs 11, 13, 15, 22, 23, 24, 26, and 27 except to the extent that the positions or contentions described are or directly relate to events. The A.L.J. has noted the rejection of Finding No. 16, and the affidavits submitted supersede Finding No. 25.

6. According to the 1980 Census, Montrose had a population of approximately 8,500 and Olathe School [sic] a population of approximately 1,200. 1990 Census figures are not presently available.

7. The plan document bears a beginning date of October 27, 1990 ("10/27"), but both testimony and other documents make clear that the conference actually occurred and the plan was entered on November 27 ("11/27").

8. The Parents expressed concern with the use of the label SLIC in identifying the handicapping condition, because of concern that it would

create a stigma. Otherwise, the Parents agreed.

9. The District had 46 exhibits; Appellees presented a book with 15 exhibits, all but two of which were duplicative of District exhibits.

10. The trial briefs of counsel were not included in the record submitted to the A.L.J. The omission is immaterial since both sides presented briefs to the A.L.J. which may be fairly regarded as having included all legal arguments included in the trial briefs.

11. In the testing with Dr. Rogers, T.M. had a derived ratio score of 82 on the Raven's Progressive Matrix, described as a non-verbal test to reflect general intelligence, and a ratio I.Q. score of 43 on the Leiter International Performance Scale. Dr. Rogers administered three other tests, one of which had three parts, and T.M.'s scores ranged from a low of 54 to a high of 76.

12. "Plus or minus 6" is described as meaning that the chances are 90% that the Child's actual I.Q. falls somewhere between 6 below and 6 above the listed number, or in this case at least 60 and no higher than 72.

13. T.M. scored 76, 54 and 57 on the three components, for an average of 62.3 (187 ÷ 3); 76 was described as ± 4.5 and the other two scores ± 7; the A.L.J. used a reasonable figure between those extremes as an average.

14. Based on Table BC-2 in Sattler, J.M., ASSESSMENT OF CHILDREN, 3rd Ed. [sic] (1988). The table lists scores of 76 to 88 as low average, 68 to 76 as slow learner, and 67 and below as mentally retarded on the S-BIS and 80-89 as low average, 70-79 as borderline, and 69 and below as mentally deficient or mentally retarded on the WISC-R.

15. The addendum to the I.E.P. which resulted from the meeting states that A.D.D. testing was "not required for making recommendations concerning needs, Goals/objectives and placement," without stating any

reason for that decision. In view of the Child's well-documented limited attention span and prior pattern of acting-out behavior, the rejection is somewhat puzzling.

16. T.M. had already undergone numerous tests while in pre-school, and had generally scored below age level; he apparently did not have the knowledge and abilities of most children before formal schooling has [sic] begun.

17. Based on testimony, although the I.E.P. included some academics in the regular classroom with assists for the curriculum.

18. The progress consisted of mastering 30 sight words, knowing the hour, and being able to count to 10 and recognize numbers up to 11. He could also recognize letters of the alphabet, but not in order.

19. The county has another District, called West End School District RE-2, which serves towns in the western portion of the county near the Utah border. The map shows no east-west roads between Montrose and those towns; they are reached by north-south roads from other counties or from Utah.

20. The facilities plan listed eight elementary schools, but one (Uncompaghre) is to be closed and sold.

21. Inferred from Colorado map, which shows no towns in the eastern portion of the county other than Montrose, Olathe, and Cimarron (to the extreme east near Blue Mesa Reservoir).

22. The age of the building was not specified in the evidence. From the pictures and testimony, it is probably 60 to 70 years old, meaning that it was built sometime in the 1920s or early 1930s. Even if it was more recently built, that would not change the architectural barriers.

23. Binder's affidavit states the current amount. He estimated a 5% salary increase from then current negotiations with the teacher's union to arrive at the high figure of $31,907.

24. Based on adding 5% to $11,290.84.

25. Binder presented a contractor's estimate placing the cost of making Olathe School handicapped-accessible at $138,000. Dr. Brian McNulty, Director of Special Education for CDE, had said that an amount up to $50,000 might be available through federal sources for that purpose. Dr. McNulty questioned the elevator cost in the estimate, and suggested that the District obtain another estimate if there was a desire to go forward.

26. Even though the Parents do not insist on the school being brought to full accessibility by renovations, they do ask for accommodation to make the facility more accessible, such as other students obtaining books in the library to bring to T.M.

27. Apparently the same case as that cited by both counsel as "*Petitioner-Appellant v. Arapahoe School District No. 6/Littleton Public Schools*, Case No. ED S90:101 (November 30, 1990)." The inference, despite the differences in numbers, arises from the identification of the district involved, the date of decision, and the context of the citation.

28. In *S.M.B., supra*, both parties had agreed that the appropriate goal for the retarded high school aged student involved was independence. At the hearing here the Mother expressed an ultimate desire that T.M. become a productive member of society. It is probable that, at this point in his development, the extent of T.M.'s potential is unknown; thus establishing a realistic long-term goal would be difficult. That issue may well become clearer after exposure to the program at Northside.

29. As an example, children of T.M.'s age have usually mastered several hundred sight words.

30. This creates a sharp contrast with *S.M.B., supra*, where the Parents and the LEA were far apart on all aspects of the plan including needs, goals and implementation and the plan was inappropriate because it did not address clearly identified needs. Lack of consensus there contributed to the defectiveness of the I.E.P., which also failed to address major issues.

31. Potential availability of at least some financial assistance to improve the school's accessibility and the willingness of the Parents to accept the physical limitations in order to have T.M. attend Olathe School would negate any rejection of that school solely on the basis of physical accessibility.

32. Calculated by adding Binder's estimated figures, as follows: salary of teacher, $30,388 to $31,907; salary of paraprofessional, $11,290.84 to $11,855.38, combined total $41,678.84 to $43,462.38. Binder listed one-time costs for [sic] as $1,500 for training, $1000 for start-up materials, and $3,000 for equipment, primarily computer software, for a total of $5,500. Binder's supplemental affidavit showed that transporting T.M. to Northside would not add to the transportation costs the District already incurs for Olathe residents attending school in Montrose. Therefore, the cost of appropriate programming at Olathe School cannot be reduced by saved transportation cost.

33. Binder testified there was one other PH student, a person of normal intelligence who operates at grade level, at Olathe School in 1990-91. That student is going elsewhere in 1991-92. The evidence identified no other S/P needs children at Olathe School.

34. [ALJ omitted the text of Footnote 34 in his decision.]

CERTIFICATE OF HAND DELIVERY

I certify that the following parties, have received a true and correct copy of the above DECISION UPON STATE LEVEL REVIEW by hand delivery to: Susan S. Schermerhorn, Esq., 2595 Canyon Blvd., Boulder, CO 80302-6703; Randy Chapman, Esq., The Legal Center, 455 Sherman Street, Suite 130, Denver, CO 80203-4403; on this 9th day of September, 1991.

/s/ D. Garcia
Secretary to Administrative Law Judge

CERTIFICATE OF HAND-DELIVERY

I hereby certify that a true and correct copy of the above DECISION UPON STATE LEVEL REVIEW was hand-delivered to Fred Smokoski, Special Education Director, Special Education, 201 E. Colfax, #300, Denver, Colorado, on this 10th day of September, 1991.

/s/ Peggy Bjorgaard
Secretary to Administrative Law Judge

BEFORE AN IMPARTIAL HEARING OFFICER

STATE OF COLORADO

FINDINGS OF FACT AND DECISION

In the matter of the educational placement of TYLER MURRAY by and through his parents JOHN and MYRNA MURRAY,

Petitioner,

and

THE MONTROSE COUNTY SCHOOL DISTRICT RE-1J,

Respondent.

A due process hearing was conducted in this matter at 126 South 5th Street, Montrose, Colorado, beginning at 9:00 a.m. on Monday, March 25, 1991, and concluding at 3:15 p.m. on Wednesday, March 27, 1991. The following were present during the entire hearing: John and Myrna Murray, Chester R. Chapman (attorney for Petitioner), Don D. Binder (Director of Special Education for Respondent), Susan S. Schermerhorn (attorney for Respondent), and Gordon F. Esplin (Impartial Hearing Officer, hereinafter "IHO"). Upon the evidence presented the IHO enters the following Findings of Fact:

FINDINGS OF FACT

1. Tyler Murray is a student at Olathe Elementary School a school within the Respondent district.

2. Tyler Murray is a handicapped child as that term is defined by the Individuals with Disabilities Education Act (hereinafter "IDEA"), 20 U.S.C. 1401 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (hereinafter "Section 504") 219 [sic] U.S.C. 794.

3. The Respondent receives federal financial assistance from the U.S. Department of Education.

4. Tyler Murray was born September 20, 1982.

5. Tyler Murray is currently an eight year six month old boy with severe cerebral palsy which has affected gross motor, fine motor, and oral motor functioning. He is non-ambulatory, has very impaired fine motor function, and has great difficulty with speech production. Psychological assessment reveals a very complex picture of strengths and weaknesses. Language abilities and general knowledge are strengths, while math, reading and short term memory are weaknesses. He currently demonstrates evidence of two kinds of educational difficulties: 1) slower overall intellectual development in general, currently in the borderline range of normal abilities, and 2) specific learning impairments, particularly involving math, reading and memory, but also perhaps visual/perceptual skills as well.

6. To benefit from education, Tyler Murray needs the following:

(External):

* Direct instruction works best in a 1:1 or 1:2, not small group.
* Tasks altered for interest.
* Tasks broken down.
* Positioning, transferred often.
* Physical assistance for transfers and basic functional tasks (coat, lunch tray, toileting).
* Physical prompting, constant redirection to task.
* Limited visual and auditory distractions.
* Enlarged visuals.
* Hands-on experiences.
* To experience success.
* Frustration kept low.
* Reinforcers such as games and prizes.
* Prompting for elaboration of expressive language.
* Concretes/not abstract.
* Continuous review/repetition.
* Daily participation with non-handicapped peers for language development.

(Internal):

* To learn topic maintenance.

* Learn to read.

* Take initiative/assume responsibility.

* To build self-esteem.

* To become more expressive.

* To initiate classroom participation.

* To increase use of descriptive words.

* To improve speech intelligibility.

* To learn with whole language approach.

* To improve visual-motor.

* Increase attention span.

* To improve social interaction appropriate [sic] interactions with peers and adults.

* Increase cognitive organization.

* Increase spontaneous utterances in the classroom.

* Improve topic maintenance.

* Increase visual/motor scanning perception and cross modal performance.

7. During 1988 Tyler Murray entered kindergarten at Olathe Elementary School.

8. Olathe Elementary School has architectural barriers that make it difficult for Tyler Murray to get to many areas of

the campus. The campus includes a multiple-story main building with no classrooms on ground level that houses [sic] grades 3-6; a one level primary building housing grades K-2 and several temporary buildings. Currently Tyler Murray cannot get to many places on campus unassisted. If classrooms are not reassigned he will have greater difficulty next year in accessing third grade in the main building.

9. John and Myrna Murray do not complain of the architectural barriers at Olathe Elementary and have not requested their removal or alteration.

10. Since 1988 to the present, Respondent has expressed to Mr. and Mrs. Murray that those architectural barriers may have an adverse impact on Tyler Murray's education.

11. Respondent maintains that Tyler Murray's needs, as set forth in Finding number 6 above, cannot be met at Olathe Elementary School but can be met at Northside Elementary or Johnson Elementary Schools, which are also within said school district. Northside and Johnson Elementary Schools are ten miles away from the Murray's home.

12. Myrna Murray visits Tyler Murray's classroom and school several times a week. She goes on all field trips. She also monitors Tyler Murray's progress with private therapists several times a week.

13. Myrna Murray maintains that Tyler Murray's needs as set forth in Finding number 6 above are being and continue to be met at Olathe Elementary School.

14. Olathe Elementary School is the school which Tyler Murray would attend if he was not handicapped. His home

is five blocks from that school. His younger brother, Jed Murray, currently seven years old attends that school.

15. John and Myrna Murray maintain that it is important that Tyler Murray attend his neighborhood school for the following reasons: (a) They do not want Tyler Murray stigmatized by attending a special school because he is handicapped, (b) The family has good communication with Olathe Elementary in that they are involved in many school activities since the school is close to their home and their other child also attends that school, (c) Tyler Murray has friends at Olathe Elementary School who come home with him after school and spend weekends with him, (d) They want their children to attend the same school so the boys will consider themselves similar as will other family and neighbors, (e) If the two Murray boys are in the same school they can look out for each other and through both children the parents can better receive communication regarding school activities and how the boys are being integrated socially, (f) Having Tyler in Northside would be very disruptive to the family because of difficulty in arranging schedules to get Tyler to therapy and to care for his brother, friends couldn't come home with Tyler after school, and there would be less family time because more driving would be required.

16. The best practice in special education according to current wisdom in the field is to educate special needs children in their neighborhood schools to the greatest extent possible.

17. Special education programs are often concentrated in designated schools within a school district because of cost

efficiencies that allows the district to provide a better program on its limited budget.

18. The Respondent has financial problems that have resulted in three of its schools being condemned since 1984 and the recent necessity to lay off some staff.

19. The Olathe Elementary School building is not currently adequate to serve its students. That inadequacy is evidenced by the following: Two classes meet in temporary buildings, the music room for the over 500 students is an approximate 20'x30' [sic] out building, the special education room serving over 30 students is a converted shower room approximately 30'x15'[sic], the cafeteria does not meet established standards.

20. The teachers that are teaching and who have taught Tyler Murray at Olathe Elementary School are all master teachers because of their: length of service as teachers, educational preparation, and dedication to their students.

21. Those persons who provide related services such as physical therapy, occupational therapy, speech/language therapy and psychological services would be the same at Olathe, Northside, or Johnson Elementary.

22. Tyler Murray's two current special education teachers, regular education teacher, principal, psychologist, social worker and the district's director of special education maintain that Tyler Murray is not receiving an appropriate education, specifically in the academic areas of math, reading and written language at Olathe Elementary School because: (a) There are not enough teachers and paraprofessionals at Olathe Elementary to give Tyler Murray the individual education he needs to progress academically,

(b) The Olathe teachers do not have the training and experience to modify the regular education curriculum to the extent required by Tyler Murray's severe needs. The above named people are part of the Individualized Education Program (hereinafter "IEP") staffing team as required by IDEA. Further, these individuals maintain that the above noted deficiencies in the education services provided Tyler Murray at Olathe Elementary School are not found at Northside Elementary. The above individuals also maintain that the above noted deficiencies in the educational services provided at Olathe Elementary have adversely impacted Tyler Murray because: He has failed to keep up with his non-handicapped peers (i.e. [sic] in second grade he is not doing second grade work), the gap between Tyler Murray's academic progress and that of his non-handicapped peers is increasing, and during the past year his need for special education services (as opposed to services in the regular classroom) have dramatically increased.

23. Tyler Murray's occupational therapist, physical therapist, speech therapist, and parents who are all members of the IEP staffing team maintain that Tyler Murray is receiving an appropriate education at Olathe Elementary and that he should continue there for the reasons set forth above in Findings 15, 20 and 21.

24. Mr. and Mrs. Murray maintain that Tyler Murray began his academic career far behind his non-handicapped peers and because of his handicapping conditions is not expected to progress at the rate of non-handicapped children.

25. There was no evidence presented regarding any difference in cost to the district in providing educational services to Tyler Murray at the various locations.

26. Those IEP team members who favor Northside maintain that if Tyler Murray attends Northside he will spend more time in the regular classroom because of the resources at that school that allow for greater program adaption [sic].

27. Mr. and Mrs. Murray maintain that Tyler Murray's lack of progress was caused by regression during the 1990 summer vacation and problems associated with a surgery performed during the summer of 1990 (weeks in an body cast, painful sores, etc.).

APPLICABLE LAW

This case involves "mainstreaming" or the "least restrictive environment" or "LRE". LRE was defined by Congress at 20 USC [sic] § 1412(5)(B) which states in part:

> "The State has established procedures to assure that, to the maximum extent appropriate, handicapped children ... [sic] are educated with children who are not handicapped, and that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily,"

The above statutory requirement has been explained and implemented by the Colorado Department of Education's State Plan for Fiscal Year [sic] 1989-91 under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142 (see pages 77 through 85, hereinafter "State Plan").

The IHO concludes that the ideal LRE is the regular education program at the school the child would attend if not handicapped (see paragraph 5 on page 78 of the State Plan).

STANDARD

Courts that have reviewed LRE cases have concluded that the test for determining the appropriateness of the education provided to a child pursuant to IDEA by the U.S. Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 at 206-07; 102 S.Ct. [sic] 3034 at 3050-51 (1982) is not helpful in analyzing LRE cases (*see A.W. by & through N.W. v. Northwest R-1 School District*, 813 F.2d 158, at 163, fn.7 (8th Cir. 1987); *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058, at 1062 (6th Cir. 1983); and *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 at 1045 (5th Cir. 1989)).

According to the 6th Circuit in *Roncker* which was also utilized by the 8th Circuit in *A.W.*, the proper test in a mainstreaming case is:

> "[t]he proper inquiry is whether a proposed placement is appropriate under the Act....[sic] In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities . . . because any marginal benefits

received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children." *Roncker* at 1063.

According to the 5th Circuit in *Daniel*, the proper test in a mainstreaming case is:

"First we ask whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. *See* §1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate." *See Daniel R.R.* 874 F.2d at 1048.

The appropriate standard for this case is:

Can the services that make Northside superior be provided at Olathe? (*see Roncker*)

or

Can education at Olathe be achieved satisfactorily for Tyler Murray? If not what is the next least restrictive alternative? (*see Daniel*)

The question that must be answered is whether or not Tyler Murray is receiving an appropriate education at Olathe Elementary.

Before proceeding to an analysis of this case it should be noted that in analyzing the congressional history of IDEA,

the U.S. Supreme Court indicated that the intent of IDEA was to open the door of public education to handicapped children and not to guarantee any particular level of education once inside. *Rowley* 458 U.S. at 182. Thus IDEA does not require an education that maximizes a child's potential. *Id.* 458 U.S. at 197 fn.21.

ANALYSIS

a.) ARCHITECTURAL BARRIERS

The Murrays are willing to put up with the architectural barriers that are violative of federal law in exchange for a neighborhood school. There was no evidence of the cost (time or money) or extent of difficulty to the district in continuing Tyler Murray's education at Olathe Elementary. There must be some additional cost in having paraprofessionals push Tyler Murray to different places on the campus, use rest rooms, etc. Without evidence of that cost it is impossible for the IHO to determine the extent of the burden these barriers place on the District. There was speculation of possible liability if people carried Tyler and accidently dropped him, etc. The answer to that speculation is that the district employees should not carry Tyler or take other action that may be dangerous but should allow him to access the program in a safe manner.

b.) LESS TIME IN REGULAR CLASSROOM/RATE OF PROGRESS

The time Tyler is spending outside of the regular classroom at Olathe is increasing because of the increasing gap between his academic level and that of his peers. There

is expert opinion that if at Northside his time in the regular classroom would dramatically increase because of the excellent adaptive programming at Northside and the other supports available there, including more teachers.

Tyler Murray's educational progress has not been as rapid as hoped. This lack of progress may be due to one or more of the following: (1) summer regression which is often exacerbated by handicapping conditions, (2) rate of maturation, (3) his surgery and subsequent rehabilitation in a body cast which was complicated by pressure sores and regression in his ability to walk, (4) lack of educational program at Olathe. Despite the slow rate of progress, it is evident that Tyler Murray is making educational progress at Olathe.

(c) SIMILARITY IN PROGRAMS

There was no evidence as to any differential in cost in time or money to the district between the program at Olathe and the program at Northside. Therefore the IHO must assume the cost is the same. Cost is one of the major factors that the courts have considered in determining LRE cases. The related services would be the same at both.

(d) SOCIAL CONCERNS (eg. [sic] Self esteem[sic], Interaction, etc.)

Olathe is clearly superior for Tyler Murray's social development because of the following: He has a brother at that school, he has friends at that school, his family is involved in that school, it is more convenient for the family at that school, there is no stigma of going to a special school, and that school is in his neighborhood.

DECISION

Because the law does not require the best possible education, it is the decision of the IHO that Tyler Murray is receiving an appropriate education at Olathe Elementary School with the resources currently available there and pursuant to the principle of the least restrictive environment he should remain at Olathe Elementary School where he can participate in a "regular education [sic] environment" until such time as his needs dictate another placement.

Dated this 10th day of April, 1991.

By:/s/ Gordon F. Esplin
Gordon F. Esplin
Impartial Hearing Officer

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing FINDINGS OF FACT AND DECISION was deposited in the United States mail, postage prepaid, on this 10th day of April, 1991, addressed as follows:

Susan S. Schermerhorn, Esq.
Caplan and Earnest
2595 Canyon Blvd., Suite 400
Boulder, CO 80302-6703

Chester R. Chapman, Esq.
The Legal Center
455 Sherman St., Suite 130
Denver, CO 80203-4403

Colorado Department of Education
Attn: Brian McNulty
201 East Colfax Avenue
Denver, CO 80203

/s/ Cara Malen

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TYLER MURRAY, by and through
his parents and next friends,
John and Myrna Murray,

Plaintiff - Appellant/Cross-Appellee,

v.

Nos. 93-1466
93-1474

MONTROSE COUNTY SCHOOL
DISTRICT RE-1J, a School
District of the State of Colorado,

Defendant - Appellee/Cross-Appellant.

ORDER
Entered May 8, 1995

Before ANDERSON and McWILLIAMS, Circuit Judges. and BROWN*, District Judge.

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*Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellant/cross appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

/s/Audrey F. Weigel
Deputy Clerk

STATUTORY AND REGULATORY PROVISIONS INVOLVED

20 U.S.C. § 1412(5)(B) --

1412. Eligibility requirements.

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(5) The State has established . . . (B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . .

20 U.S.C. § 1407(b) --

§ 1407. Regulation requirements.

(b) Lessening of procedural or substantive protections as in effect on July 20, 1983, prohibited. The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter which would procedurally or substantively lessen the protections provided to children with disabilities under this chapter, as embodied in regula-

tions in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

34 C.F.R. § 300.552 --

Placements.

Each public agency shall ensure that:

(a) The educational placement of each child with a disability--

(1) Is determined at least annually;
(2) Is based on his or her IEP; and
(3) Is as close as possible to the child's home.

(b) The various alternative placements included at § 300.551 are available to the extent necessary to implement the IEP for each child with a disability.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

Inquiry by: Dr. Greg Frith
Head, Special Education Department
Jacksonville State University
Jacksonville, Alabama 36265

Text of Inquiry

I am writing to request clarification pursuant to the implications of a specific regulation in P.L. 94-142. The regulation is stated as follows:

Reg. 121a.552 Placements.

Each public agency shall insure that (a) each handicapped child's educational placement (3) is as close as possible to the child's home.

(c) Unless a handicapped child's individualized educational program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped.

Does this regulation mean that the local education agency must provide the appropriate educational program (regardless of exceptionality) in the school closest to the child's home and in the school that the child would attend if he were not handicapped? Or does the local education agency retain the prerogative to offer the appropriate educational program in a specific school and subsequently make whatever transportation arrangements are necessary for the child to attend? This question is particularly meaningful in terms of local school programs in areas of exceptionality with relatively low incidence. Also, to what extent are financial impositions of providing programs "as close as possible to the child's

home" and "in the school the child would attend if he/she were not handicapped" to be considered?

Text of Response
[December 26, 1978]

In your letter, you quoted part of the placement requirements from Reg. 121a.552 and asked does this regulation mean that the local educational agency must provide the appropriate educational program in the school closest to the child's home. The answer to this question is a qualified yes. That is, placement in the school closest to the child's home is one of several factors to be considered when making a placement decision. Other factors for consideration are also included in Reg. 121a.552(a) (e.g., each child's placement must be determined individually and annually, and must be based on the child's IEP). Moreover, Reg. 121a.552(d) states that in making a placement decision, consideration must be given to any potential harmful effect on the child or the quality of services which he or she needs.

The qualifier in your first question (i.e., the parenthetical addition to your question--"regardless of exceptionality") is somewhat more difficult to discuss. Generally, placement decisions cannot be made on a class or categories basis (e.g., all blind children must go to the school for the blind). Rather, as stated above, the decisions must be based on each child's individual special education and related service needs. Thus, a blind child might be able to be educated in the local school district with supplemental assistance from a resource teacher of the blind, while another child may need an alternative placement. The main point is that placement decisions must be made on a case-by-case basis.

In your second question, you ask does the local educational agency retain the prerogative to offer the appropriate educational program. I refer you, again, to Reg. 121a.552(b). This section states that each child's placement (program) must be set out in the child's IEP. As you know, the IEP is developed jointly with the child's parent(s), the child's teacher, and a representative of the agency. Thus, the placement decision must be made jointly by the agency and the child's parent(s), and must be based upon the various factors set forth in Reg. 121a.552.

In your third question, you ask the extent to which the financial impositions of providing programs "as close to home as possible" are to be considered when placing a child. Financial concerns cannot be the basis for making a placement decision. For example, if a child could attend his own local school except for the need to provide an aide to assist him, it would be hard to justify sending that child to a more distant school.

Thomas B. Irvin
Chief, State Policy and
Administrative Review Branch

Inquiry by: Paul H. Levy, President
The Whole Person, Inc.
9805 Pennsylvania
Kansas City, MO 64114

Text of Inquiry

In reference to our telephone conversation of June 20, I would like a letter to be written spelling out the details of your response to my inquiry.

In working with the school district of Kansas City, Missouri, the question arose as to whether they need to have more than one elementary, one junior and one senior high school fully accessible under the terms of Public Law 94-142. Your response was conveyed to the Director of Special Education by me via a phone conversation that following Monday.

I still need the details explained in writing for his use in a presentation to the Board of Education. If an early response is possible, that would be appreciated. The letter is to be written directly to Dr. Jasper Harris, Director of Special Services, Kansas City, Missouri, Public Schools, 1211 McGee, Kansas City, Mo. 64106 and copied to me.

Your cooperation is very much appreciated. Hopefully, this letter will spur the district into action to begin to fulfill their obligation to 94-142.

Text of Response
[October 8, 1980]

This is in response to a letter from Mr. Paul H. Levy, President of the Whole Person, Inc. to Dr. Jerry Vlasak, Acting Chief of the Administrative Review Branch, Division

of Assistance to States. In his letter, Mr. Levy asked that we forward directly to you information regarding implementation of the P.L. 94-142 requirement to place handicapped children in the least restrictive environment (LRE). Mr. Levy had already discussed this issue with Dr. Vlasak in a recent telephone conversation.

In his letter, Mr. Levy stated that: "In working with the school district of Kansas City, Missouri, the question arose as to whether they need to have more than one elementary, one junior, and one senior high school fully accessible under the terms of P.L. 94-142." This issue is addressed in Reg. 300.552 of Part B regulation:

> "Each public agency shall insure that:
>
> (a) Each handicapped child's educational placement . . . is as closes as possible to the child's home . . ." and ". . . (c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped . . .[sic]"

This same section also states that:

> "Each public agency shall insure that . . . (b) The various alternative placements included under Reg. 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child" . . . and "(d) In selecting the least restrictive environment consideration is given to any potential harmful effect on the child or the quality of services which he or she needs."

The comment following Reg. 300.552 states that:

> "The overriding rule in this section is that placement decision must be made on an individual basis."

The preceding paragraph provides the regulatory authority upon which Dr. Vlasak based the information he gave to Mr. Levy. A child's placement in the least restrictive environment is determined on an individual basis, as set out in the child's individualized education program (IEP). However, unless a handicapped child's program requires some other arrangement, the handicapped child is educated in the school he/she would attend if not handicapped, and any necessary ancillary aids or services must be provided on that campus without regard to resources available to administrative convenience.

In other words, the criterion used for determining the appropriate implementation of LRE requirements under P.L. 94-142 is not the number of schools within a school district which are accessible, but rather whether each handicapped child within a district is appropriately placed. A handicapped child should attend the school he/she would attend if not handicapped, unless the services required to meet his/her unique needs cannot be provided within that school. It would not be in agreement with the intent of P.L. 94-142 or § 504 of the Rehabilitation Act of 1973 to deny a child placement in the school closest to his/her home because of inaccessibility.

I hope that this information is useful to you. Enclosed with this letter is a copy of an article entitled "Mainstreaming Handicapped Children: The Underlying

Legal Concept" by Dr. Vlasak and an IEP policy paper prepared by Thomas Irvin. These papers will provide you with additional information concerning the placement of handicapped children.

Please let me know if you have any questions regarding this letter or the enclosed materials. I can be reached on (202) 472-7921.

Shirley A. Jones
Acting Chief, Policy Branch
Office of Special Education

Honorable John M. Spratt, Jr.
House of Representatives
Washington, DC 20515

Text of Inquiry

I would like to express to you some of my concerns about a situation developing in the schools of our state and nation -- the implementation of the policy of inclusion of students with special needs into mainstream classes by order of the civil rights commission.

I feel it is wrong to require parents to comply with this ruling of the commission if it is against their wishes, and they do not believe it to be in their child's best interest. One of my most serious concerns is that a group of bureaucrats hundreds of miles away can require this when my inquiries indicate that only one visit was made with subsequent telephone calls to help give them a clear understanding of the issues involved.

I have visited our center for special needs students and found it to be a warm, caring and loving place. It is a school that understands and works with each student to help them reach *their* highest level of education, and I do not believe that inclusion will accomplish this. If there are parents who wish their children to participate in the inclusion process, and the children are found to be qualified, then they should by all means be allowed to do so. Those parents who do not want their students moved should be allowed that decision as well.

More than 80% of our mentally handicapped are maintained in their own homes by their families who struggle daily with the challenges of developing maximum self-

sufficiency in their children. They know the needs and capabilities of these children better than anyone, and they also understand the stresses associated with teaching them. As a retired school teacher, I do not feel that mainstream schools and classroom teachers are trained or equipped to deal with the complexities of integrating "special needs" approaches appropriately. The result of forcing this on our parents and schools could be frustration, resentment, and a seriously diminished level of educational service to those most desperately in need.

I greatly appreciate your consideration and any assistance you could lend in this matter.

Text of Response [January 12, 1994])

Thank you for your letter to former Assistant Secretary Robert R. Davila reflecting the concern of South Carolina State Representative James G. Mattos, regarding the "inclusion of students with special needs into mainstream classes." In addition, you have expressed concerns about "parent involvement" in the education of children with disabilities. I hope you will excuse the delay in my reply.

During the six months since I was confirmed as Assistant-Secretary for the Office of Special Education and Rehabilitative Services (OSERS), I have had the opportunity to meet or talk with the leadership of numerous organizations involved in advocacy for disabled children and adults. I have also met with hundreds of parents of disabled children across the nation. I firmly believe that within the last twenty years there have been major accomplishments in the education of disabled students in this country. However, I know more needs to be done. The primary concern I have heard ex-

pressed during these conversations is that for many disabled children the full range of placement options is not available.

The continuum of alternative placements is an integral part of the regulations for Part B of the Individuals with Disabilities Education Act (IDEA) which the Office of Special Education Programs' Director Tom Hehir and I are bound, both by our positions and by our own beliefs, to enforce. Tom and I both believe, consistent with IDEA, that the regular classroom in the neighborhood school should be the first placement *option* considered for students with disabilities. We also believe our education system must provide administrators and teachers with the training and support they need to make the regular classroom in the neighborhood school the appropriate placement, and we aim to provide strong leadership to help make that happen.

Being disabled myself and having received part of my education in segregated settings for no other reason than I happened to use a wheelchair, I do not shrink from describing such placements as wrong -- when the placement is made for reasons other than the educational needs of the child. With 50 percent of physically disabled students still receiving their education in some type of separate setting, I will continue to make strong statements in support of regular classroom placements. At the same time, we fully appreciate and support the important role of other options on the continuum for some students.

I also know of the critical need for parents of all disabled children to receive more and better information about the available options and the supports that may be needed for their children. I believe that the more information parents have, the more effective they will be in the decision-making

process affecting their children's education. There is a role for all of us in this empowerment process.

Also, in response to your concern regarding "parental involvement in the schooling of disabled children," I would like to review a stated purpose of Part B (*see* 34 CFR § 300.1), which is "[to ensure] that the rights of [children with disabilities] and their parents are protected." Part B provides for parent involvement at every stage of educational planning for the child with disabilities. For example, you can note the role given to parents, in the development of IEPs (*see* 34 CFR §§ 300.340-300.349), and in the due process procedures for parents and children (*see* 34 CFR §§ 300.500-300.514), which include the prior notice and parent consent requirements at 34 CFR § 300.504-300.505, as well as the attention given to parents in protecting the confidentiality of information (*see* 34 CFR §§ 300.560-300.576).

I appreciate your bringing to my attention the concerns expressed by State Representative Mattos. I have enclosed for your information a copy of the Part B regulations. For further information regarding issues relevant to the specific ruling of the civil rights commission to which State Representative Mattos refers in his letter, you may wish to contact the Office for Civil Rights directly:

Ms. Jean P. Peelen
Director, Elementary and Secondary
Education Policy Division
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Switzer Building, Room 5046
Washington, DC 20202-2274

I hope that the information in this letter is helpful to you. If this Office can be of further assistance, please let me know.

Judith E. Heumann
Assistant Secretary

November 23, 1994

OSEP Memorandum 95-9

Judith E. Heumann, Assistant Secretary Thomas Hehir, Director

Introduction

The least restrictive environment (LRE) requirements of Part B of the Individuals with Disabilities Education Act (IDEA) have been included in the law in their present form since 1975. However, these requirements continue to generate complex and interesting questions from the field. In particular, questions have been raised about the relationship of IDEA's LRE requirements to "inclusion." Consistent with our attempt to provide you and your staff with as much current information as possible and to ensure that the applicable requirements of IDEA that govern the education of students with disabilities are accurately understood and properly implemented, guidance on IDEA's LRE requirements is being provided in a question and answer format. In most cases, this question and answer document consolidates the prior policy guidance that the Department has provided in this area. We encourage you to disseminate this document to a wide range of individuals and organizations throughout your State. Any further questions should be directed to the contact person named at the beginning of this document or to Dr. JoLeta Reynolds at (202) 205-5507.

We hope that the above questions and answers are of assistance to you and your staff as you carry out your responsibilities to ensure that disabled students are provided a free appropriate public education in the least restrictive environment.

Questions and Answers

1. What are the least restrictive Environment [sic] (LRE) requirements of Part B of IDEA?

ANSWER:

In order to be eligible to receive funds under Part B of IDEA (IDEA), States must, among other conditions, assure that a free appropriate public education (FAPE) is made available to all children with specified disabilities in mandated age ranges. The term "FAPE" is defined as including, among other elements, special education and related services, provided at no cost to parents, in conformity with an individualized education program (IEP). The IEP, which contains the statement of the special education and related services to meet each disabled student's unique needs, forms the basis for the entitlement of each student with a disability to an individualized and appropriate education. IDEA further provides that States must have in place procedures assuring that, "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." This provision, which states IDEA's strong preference for educating students with disabilities in regular classes with appropriate aids and supports, is found in the statute at 20 U.S.C. § 1412(5)(B) and is implemented by the Department's regulations at 34 CFR §§ 300.550-300.556. Copies of the relevant statutory

and regulatory provisions are attached to this question and answer document. [OMITTED]

2. Does IDEA define the term "inclusion?"

ANSWER:

IDEA does not use the term "inclusion"; consequently, the Department of Education has not defined that term. However, IDEA does require school districts to place students in the LRE. LRE means that, to the maximum extent appropriate, school districts must educate students with disabilities in the regular classroom with appropriate aids and supports, referred to as "supplementary aids and services," along with their nondisabled peers in the school they would attend if not disabled, unless a student's IEP requires some other arrangement. This requires an individualized inquiry into the unique educational needs of each disabled student in determining the possible range of aids and supports that are needed to facilitate the student's placement in the regular educational environment before a more restrictive placement is considered.

In implementing IDEA's LRE provisions, the regular classroom in the school the student would attend if not disabled is the first placement option considered for each disabled student before a more restrictive placement is considered. If the IEP of a student with a disability can be implemented satisfactorily with the provision of supplementary aids and services in the regular classroom in the school the student would attend if not disabled, that placement is the LRE placement for that student. However, if the student's IEP cannot be implemented satisfactorily in that environment, even with the provision of supplementary aids and ser-

vices, the regular classroom in the school the student would attend if not disabled is not the LRE placement for that student.

3. How can IDEA requirements be implemented to ensure that consideration is given to whether a student with a disability can be educated in the regular educational environment with the use of supplementary aids and services before a more restrictive placement is considered?

ANSWER:

The relationship of IDEA's LRE requirements to the IEP process is key, since under IDEA, the student's IEP forms the basis for the student's placement decision. IDEA requires that the IEP of each disabled student must contain, among other components, a "statement of the specific special education and related services to be provided to the child and the extent that the child will be able to participate in regular educational programs." 34 CFR § 300.346(a)(3). At the student's IEP meeting, the extent that the student will be able to participate in regular educational programs is one of the matters to be addressed by all of the participants on the student's IEP team before the student's IEP is finalized. In addressing this issue, the team must consider the range of supplementary aids and services, in light of the student's abilities and needs, that would facilitate the student's placement in the regular educational environment. As discussed in question 4 below, these supplementary aids and services must be described in the student's IEP. Appendix. C to 34 CFR Part 300 (question 48).

4. Does IDEA define the term "supplementary aids and services?"

ANSWER:

No. However, in determining the educational placement for each disabled student, the first line of inquiry is whether the student's IEP can be implemented satisfactorily in the regular educational environment with the provision of supplementary aids and services. This requirement has been in effect since 1975 when the Education of the Handicapped Act (EHA), the predecessor to the IDEA, originally became law.

Consistent with this requirement, any modifications to the regular educational program, i.e., supplementary aids and services that the IEP team determines that the student needs to facilitate the student's placement in the regular educational environment must be described in the student's IEP and must be provided to the student. Appendix C to 34 CFR Part 300 (question 48). While determinations of what supplementary aids and services are appropriate for a particular student must be made on an individual basis, some supplementary aids and services that educators have used successfully include modifications to the regular class curriculum, assistance of an itinerant teacher with special education training, special education training for the regular teacher, use of computer-assisted devices, provision of notetakers, and use of a resource room, to mention a few.

5. How frequently must a disabled student's placement be reviewed under IDEA?

ANSWER:

Under IDEA, each disabled student's placement must be determined at least annually, must be based on the student's IEP, and must be in the school or facility as close as possible to the student's home. Under IDEA, each student's placement decision must be made by a group of persons, including persons knowledgeable about the student, the meaning of evaluation data, and the placement options. While the student's IEP forms the basis for the placement decision, a student's IEP cannot be revised without holding another IEP meeting, which the school district is responsible for convening. If either the student's parent or teacher or other service provider wishes to initiate review of the student's IEP at a point during the school year that does not correspond with the annual IEP review, that individual can request the school district to hold another IEP meeting. If the IEP is revised, following the meeting, the placement team would need to review the student's IEP to determine if a change in placement would be needed to reflect the revised IEP.

6. If a determination is made that a student with [sic] disability can be educated in regular classes with the provision of supplementary aids and services, can school districts refuse to implement the student's IEP in a specific class because of the unwillingness of a particular teacher to educate that student in his or her classroom or the teacher's assertion that he or she lacks adequate training to educate that student effectively?

ANSWER:

Under IDEA, lack of adequate personnel or resources does not relieve school districts of their obligations to make FAPE available to each disabled student in the least restrictive educational setting in which his or her IEP can be implemented. Exclusion of a student from an appropriate placement based solely on the student's disability is prohibited by Section 504 of the Rehabilitation Act of 1973. However, placement in a particular regular class based on the qualifications of a particular teacher is permissible under both statutes. The public agency has an affirmative responsibility to ensure the supply of sufficient numbers of teachers who are qualified, with needed aids and supports, to provide services to students with disabilities in regular educational environments, and to provide necessary training and support services to students with disabilities. The Department encourages States and school districts to develop innovative approaches to address issues surrounding resource availability. Factors that could be examined include cooperative learning, teaching styles, physical arrangements of the class room, curriculum modifications, peer mediated supports. and equipment, to mention a few.

7. Once a determination is made that a disabled student cannot be educated satisfactorily in the regular educational environment, even with the provision of supplementary aids and services, what consideration govern placement?

ANSWER:

IDEA does not require that every student with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class

placement may not be appropriate for every disabled student is reflected in the requirement that school districts make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of students with disabilities. This requirement for the continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each student with a disability. The options an [sic] this continuum must include "the alternative placements listed in the definition of special education under § 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions)." 34 CFR § 300.551(b)(1). These options must be available to the extent necessary to implement the IEP of each disabled student. The placement team must select the option on the continuum in which it determines that the student's IEP can be implemented. Any alternative placement selected for the student outside of the regular educational environment must maximize opportunities for the student to interact with non-disabled peers, to the extent appropriate to the needs of the student.

It also should be noted that under IDEA, parents must be given written prior notice that meets the requirements of § 300.505 a reasonable time before a public agency implements a proposal or refusal [sic] to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. Consistent with this notice requirement, parents of disabled students must be informed that the public agency is required to have a full continuum of placement options, as well as about the placement options that were actually considered and the

reasons why those options were rejected. 34 CFR §§ 300.504-300.505; Notice of Policy Guidance on Deaf Students Education Services, published at 57 Fed. Reg. 49274 (Oct. 30, 1992).

8. What are the permissible factors that must be considered in determining what placement is appropriate for a student with a disability? Which factors, if any, may not be considered?

ANSWER:

The overriding rule in placement is that each student's placement must be individually-determined based on the individual student's abilities and needs. As noted previously, it is the program of specialized instruction and related services contained in the student's IEP that forms the basis for the placement decision. In determining if a placement is appropriate under IDEA, the following factors are relevant:

> the educational benefits available to the disabled student in a traditional classroom, supplemented with appropriate aids and services, in comparison to the educational benefits to the disabled student from a special education classroom;
>
> the non-academic benefits to the disabled student from interacting with nondisabled students; and
>
> the degree of disruption of the education of other students, resulting in the inability to meet the unique needs of the disabled student.

However, school districts may not make placements based *solely* on factors such as the following:

category of disability:
severity of disability;
configuration of delivery system;
availability of educational or related services;
availability of space; or
administrative convenience.

9. To what extent is it permissible under IDEA for school districts to consider the impact of a regular classroom placement on those students in the classroom who do not have a disability?

ANSWER:

IDEA regulations provide that in selecting the LRE, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs. If a student with a disability has behavioral problems that are so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the disabled student cannot be met in that environment. However, before making such a determination, school districts must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the student in the regular educational environment to accommodate the unique needs of the disabled student. If the placement team determines that even with the provision of supplementary aids and services, that student's IEP could not be implemented satisfactorily in the regular educational environment, that placement would not be the LRE placement for that student at that particular time, because her or his unique educational needs could not be met in that setting.

While IDEA regulations permit consideration of the effect of the placement of a disabled student in a regular classroom on other students in that classroom, selected findings from Federally-funded research projects indicate that: (1) achievement test performance among students who were classmates of students with significant disabilities were equivalent or better than a comparison group (Salisbury, 1993); (2) students developed more positive attitudes towards peers with disabilities (CRI, 1992); and (3) self concept [sic], social skills, and problem solving skills improved for all students in inclusive settings (Peck, Donaldson, & Pezzoli, 1990, Salisbury & Palombaro, 1993).[1]

10. Are there any resources that the Department is aware of that have proven helpful to educators and paraprofessionals in implementing inclusive educational programs?

ANSWER:

The Department has supported a variety of professional development and training projects (e.g., preservice, inservice, school restructuring projects) that address the needs of students with disabilities in inclusive educational programs. In addition, the Department has financed Statewide Systems Change projects which support changing the setting for delivery of educational services from separate settings to general education settings in the school that the student would attend if not disabled. Numerous materials and products have been developed by these projects which have focused on strategies that support collaborative planning and problem solving, site based control, curriculum and technological adaptations and modifications, parent and family involvement, and the creative use of human and fiscal resources. These projects have underscored the importance

of timely access to resources (e.g., people, materials, information, technology) *when* they are needed.

Educators can obtain further information regarding these programs by contacting: [OMITTED].

1. California Research Institute. (1992). Educational practices in integrated settings associated with positive student outcomes. *Strategies on the Inclusion on the Integration of Students with Severe Disabilities, 3*, (3), 7, 10. San Francisco State University. San Francisco, California.

Peck C. A., Donaldson, J., & Pezzoli, M. (1990). Some benefits non-handicapped adolescents perceive for themselves from their social relationships with peers who have severe disabilities. JOURNAL OF THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, 15(4), 241-249.

Salisbury, C. L. (1993, November). *Effects of inclusive schooling practices: Costs to kids and organizations*. Presentation at the 1993 Conference of the Association for Persons with Severe Handicaps, Chicago, Illinois.

Salisbury, C. L., a [sic] Palombaro, M. M. (Eds.) (1993). *"No problem." Working things out our way*. State University of New York-Binghamton, Binghamton, New York.